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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANSAMERICA AIRLINES, INC.,
Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether federal courts have jurisdiction of a representation dispute under the Railway Labor Act in which a union complains of an air carrier's participation in the creation of a separate airline subsidiary (and a separate craft or class for collective bargaining purposes), where the Act has committed all representation disputes to the exclusive jurisdiction of the National Mediation Board.

II. Whether, during the period in which an air carrier and labor union are bargaining collectively subject to the jurisdiction and control of the National Mediation Board, federal courts have jurisdiction under the Railway Labor Act over a union complaint that the carrier's economic proposals constitute bad faith bargaining.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit appear in the caption of the case in this Court. The parent company of Transamerica Airlines, Inc. is Transamerica Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPORTS OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Air Line Pilots Association, International v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987), and is reproduced as amended at Appendix A. The Order of the Ninth Circuit denying Transamerica's Petition for Rehearing and Suggestion for Rehearing *En Banc* is unreported, but is reproduced at Appendix B. The June 5, 1985 oral decision of the District Court is unreported, but is reproduced at Appendix C. The August 6, 1985 decision of the District Court is reported as *Air Line Pilots Association, International v. Transamerica Airlines, Inc.*, 615 F. Supp. 371 (N.D. Cal. 1985), and is reproduced at Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1987, and was amended July 1, 1987. The Court of Appeals denied rehearing and rehearing *en banc* on August 12, 1987. This petition is filed within ninety days of the last-mentioned date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this case is the Railway Labor Act ("the Act"), 45 U.S.C. §§ 151-188, and in particular §§ 152, First, Third, Fourth and Ninth and 155, First, which are reproduced at Appendix E.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

Transamerica Airlines, Inc. ("Transamerica") was a commercial air carrier operating in interstate and foreign commerce prior to its shutdown on September 30, 1986. For many years, Transamerica recognized and bargained with the Air Line Pilots Association ("ALPA") as the representative of its pilots, and negotiated numerous collective bargaining agreements with ALPA. In March, 1984, Transamerica and ALPA began negotiating over the terms of a new collective bargaining agreement. Because deregulation of the airline industry had opened Transamerica's markets to numerous low-cost competitors, Transamerica's market position was rapidly declining. As a result, Transamerica sought in negotiations to lower its operating costs by obtaining wage and work rules concessions from its pilots. In July, 1984, Transamerica and

ALPA jointly invoked the jurisdiction of the National Mediation Board ("NMB"), pursuant to Section 5, First of the Railway Labor Act, 45 U.S.C. § 155, First, and continued to negotiate over the terms of a new contract under the supervision of NMB mediators, until the shutdown of the airline in 1986.

On March 27, 1985, while the NMB's mediation efforts continued, ALPA filed, in the United States District Court for the Northern District of California, a complaint containing two central allegations. First, ALPA alleged that, in the course of negotiations for a new contract, Transamerica had failed and refused "to bargain in good faith and to make and maintain agreements." Specifically, ALPA complained of the concessionary "rates of pay and working conditions" that Transamerica allegedly sought to "impose[]" upon ALPA. Second, ALPA claimed that as a means of achieving its "goal" in the negotiations, Transamerica had acted with its corporate parent, Transamerica Corporation, to establish a separate airline subsidiary (Trans International Airlines, or "TIA") to operate in Transamerica's "marketplace." ALPA did not allege, however, that Transamerica pilots lost jobs or suffered any other detriment as a result of the existence of TIA. ALPA claimed that Transamerica's actions violated Section 2, First, Third and Fourth of the Act, 45 U.S.C. § 152, First, Third, and Fourth.

Upon Transamerica's motion, the District Court on June 5, 1985 dismissed the "bad faith bargaining" aspect of ALPA's lawsuit without prejudice, holding that federal courts lack jurisdiction over such claims while the parties continue to bargain under the mediatory jurisdiction of the NMB (opinion reproduced at Appendix C).

The District Court subsequently dismissed ALPA's remaining claims concerning the existence of TIA, holding

that ALPA's claims raised a representation dispute within the exclusive jurisdiction of the NMB (opinion reproduced at Appendix D). The Court noted that ALPA's claim was virtually identical to the claim brought and dismissed for lack of subject-matter jurisdiction in *Air Line Pilots Association v. Texas International Airlines*, 656 F.2d 16 (2d Cir. 1981). *See* A30-31.

The Ninth Circuit reversed, holding that federal courts may exercise jurisdiction over suits challenging a party's collective bargaining proposals, even while the parties continue to bargain under the jurisdiction and direct supervision of the NMB's mediators. The Ninth Circuit further held that federal courts have jurisdiction over union claims concerning the existence and operation of separate airline subsidiaries, even though such claims raise representation disputes under the Act.

The central issue of this Petition for Writ of Certiorari is thus whether the federal courts have subject-matter jurisdiction over ALPA's claims—claims concerning which Congress in the Act has already placed jurisdiction and remedial power in the NMB.

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AND IGNORES LONG-ESTABLISHED PRECEDENTS OF THIS COURT, IN HOLDING THAT FEDERAL COURTS HAVE JURISDICTION OVER REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

In holding that the District Court has jurisdiction over ALPA's claims regarding the existence of TIA, the Ninth Circuit created a direct conflict in the law between its own decision and a recent decision of the Second Circuit. It also departed from this Court's consistent interpretations of the Act, as well as from the Act's interpretation by every other circuit which has addressed the issue. In its decision below, the Ninth Circuit ignored the plain design of Congress in placing all airline labor disputes of a representational nature under the exclusive jurisdiction of the NMB. Moreover, by permitting unions to pursue their "single carrier" or "alter ego" claims in federal courts as well as before the NMB, the Ninth Circuit's decision will likely lead to forum shopping, wasteful duplication of effort among the courts and the NMB, and uneven development and further conflict in the law.

In its decision below as well as in another recent case, *International Brotherhood of Teamsters v. Western Airlines,* 813 F.2d 1359 (9th Cir. 1987), *petition for cert. pending,* No. 86-1855, the Ninth Circuit has attempted to rewrite the law concerning the NMB's jurisdiction in a manner which is fundamentally inconsistent with the Act. It is essential to the stability of labor relations in the airline and railroad industries that this Court grant certiorari to resolve this important issue.

A. This Case Involves a Representation Dispute, and the Act Commits All Such Disputes to the Exclusive Jurisdiction of the NMB

In the 1934 Amendments to the Act, 44 Stat. 577 (1934), Congress vested the NMB with exclusive jurisdiction to resolve all rail labor disputes[1] involving representation issues. 45 U.S.C. § 152, Ninth. While a "representation dispute" in its most common form concerns whether a majority of employees in a "craft or class," or bargaining unit, wish to have a particular union as their bargaining representative, many collateral or related issues are representational as well. Typical is the issue of the scope of the craft or class to be represented. In that vein, the question may arise whether two ostensibly separate carriers (and separate crafts or classes), because of the interrelatedness of their operation or the purpose for which one was created, in reality constitute a "single carier" or "alter egos," and thus a single craft or class for representation purposes. *See Switchmen's Union v. NMB*, 320 U.S. 297, 301 (1943).

ALPA's claims relating to the existence and operation of TIA (at the time of filing suit, Transamerica Corporation's other airline subsidiary) raise just such "single carrier" and "alter ego" issues, and thus unmistakably raise a representation dispute. ALPA never alleged that Transamerica pilots were deprived of any then-existing work as a result of TIA's operation.[2] Rather, ALPA's

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1. In 1936, Congress placed the then-infant airline industry under the Act. Pub.L. No. 487, 49 Stat. 1189 (1936). *See* 45 U.S.C. §§ 181-88.

2. Any such allegation would at any rate have raised a "minor dispute" under the "scope" clause of the collective bargaining agreement, to be decided by the system board of adjustment, *see* 45 U.S.C. § 184.

only allegation was that TIA was created to operate in the same "marketplace" as Transamerica. ALPA's claim that the mere existence of TIA undermined the union's status as representative of Transamerica's pilots in violation of Section 2, Third and Fourth of the Act only makes sense if it is assumed that TIA and Transamerica constitute a single carrier and a single craft or class, and that ALPA had the right to represent TIA pilots. Those very assumptions involve representation issues, however, which Congress has committed to the exclusive jurisdiction of the NMB.

This Court emphatically and consistently has upheld the exclusiveness of the NMB's jurisdiction over representation issues. *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad* ("*M-K-T*"), 320 U.S. 323 (1943); *Switchmen's Union v. NMB, supra.* In *M-K-T*, this Court maintained that "[h]owever wide may be the range" of representation disputes covered by Section 2, Ninth of the Act, "Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board." As this Court put it, if a dispute falls within § 2, Ninth, "*the administrative remedy is exclusive.*" 320 U.S. at 336 (emphasis added). *Accord, Switchmen's Union, supra,* 320 U.S. at 302-03. Similarly, only recently in its *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry,* 14 N.M.B. 388 (1987), the NMB declared that "[t]he parties must recognize that the NMB alone is vested with the final decision-making authority over representation issues."

B. The Ninth Circuit's Decision Directly Conflicts With the Decision of the Second Circuit in A Virtually Identical Case

Except for the Ninth Circuit, every circuit to have addressed the issue to date has followed this Court's lead and has held that federal courts have no jurisdiction over any disputes under the Act that are representational in nature, even if such disputes also involve allegations that the Act has been violated. *See, e.g., Air Line Employees Association v. Republic Airlines,* 798 F.2d 967, 968-69 (7th Cir.), *cert. denied,* 93 L. Ed. 2d 404 (1986); *International Brotherhood of Teamsters v. Texas International Airlines,* 717 F.2d 157, 161 (5th Cir. 1983); *Air Line Pilots Association v. Texas International Airlines,* 656 F.2d 16 (2d Cir. 1981); *International Association of Machinists v. Northeast Airlines,* 536 F.2d 975, 977 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976); *Brotherhood of Railway & Steamship Clerks v. United Air Lines,* 325 F.2d 576, 578-80 (6th Cir. 1963), *cert. dismissed,* 379 U.S. 26 (1964); *Ruby v. American Airlines,* 323 F.2d 248, 255 (2d Cir. 1963), *cert. denied,* 376 U.S. 913 (1964); *Division No. 14, Order of Railroad Telegraphers v. Leighty,* 298 F.2d 17 (4th Cir.), *cert. denied,* 369 U.S. 885 (1962).

While the Ninth Circuit's decision below conflicts in principle with all of the foregoing cases, it is in *direct conflict* with the Second Circuit's decision in *Air Line Pilots Association v. Texas International Airlines, supra.* In both cases, ALPA brought federal lawsuits challenging a carrier's participation in the creation of a second, non-union airline subsidiary.[3] In *Texas International,* ALPA

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3. ALPA was represented by the same counsel in *Texas International* as in the instant litigation.

was the collective bargaining representative of the pilots employed by Texas International Airlines ("TXI"). TXI's parent company, Texas Air Corporation, established a separate airline subsidiary, New York Air ("NYA"), which was certified to fly some of the same routes as TXI. ALPA alleged in its complaint that TXI transferred TXI airport landing rights and TXI aircraft to NYA and that TXI, along with its corporate parent, "directed and controlled" the operations of NYA. 656 F.2d at 17. Those factual allegations are indistinguishable from ALPA's allegation in the instant case that Transamerica acted with its corporate parent to "devise a second airline subsidiary for [the corporate parent] to operate in Transamerica's marketplace."

ALPA's statutory claims in *Texas International* and the instant case are identical as well. In both cases, ALPA alleged that the defendant carriers' role in the creation of second airline subsidiaries violated Section 2, First, Third and Fourth of the Act. ALPA claimed that TXI's role in establishing NYA violated TXI's Section 2, First, duty to "make and maintain agreements," and was designed to deprive ALPA of "its representative status and collective bargaining rights" in violation of Section 2, Third and Fourth of the Act. *Air Line Pilots Association v. Texas International Airlines*, 502 F. Supp. 423, 424 (E.D.N.Y. 1980). So, too, in the instant case, ALPA claimed that Transamerica's alleged role in the creation of TIA constituted "a failure and refusal . . . to make and maintain agreements" under Section 2, First; and that it "subverts and impairs the representative standing, collective bargaining rights and legitimate effectiveness of ALPA to represent Transamerica's pilots," in violation of Section 2, Third and Fourth of the Act.

Recognizing the representational nature of ALPA's claims in *Texas International,* the Second Circuit affirmed the district court's dismissal of ALPA's complaint for lack of subject matter jurisdiction. It found that ALPA's complaint essentially alleged a violation of TXI's duty to bargain with respect to NYA pilots, a group which ALPA had never been certified to represent. 656 F.2d at 21-22.

The Second Circuit recognized that ALPA was not asking the court to designate it as the bargaining representative of NYA pilots,[4] but rather was charging that TXI, through the operation of NYA, was evading its bargaining obligations and subverting ALPA's status as representative of TXI pilots. 656 F.2d at 19. *ALPA brought precisely the same charges in the instant case.* The Second Circuit recognized that in order to reach ALPA's claim that NYA's operation undermined the union's rights as bargaining representative of TXI pilots, it would have to assume that TXI and NYA were a single carrier. *Id.* Such an assumption, the court held, was not within its power to make, as the issue was one reserved exclusively for the NMB. The court maintained that where an issue of representation appears in a union's lawsuit, "even in the absence of a challenge from a competing union or an application to the NMB," the court is bound to dismiss the action. *Id.* at 24.

The District Court below, in dismissing ALPA's lawsuit for lack of subject-matter jurisdiction, found *Texas*

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4. Thus, any protestation by ALPA in this case that it does not seek from the court a declaration that it is the bargaining representative of TIA pilots merely begs the question. As the Sixth Circuit recognized in *Brotherhood of Railway & Steamship Clerks v. United Airlines, supra,* with respect to a similar union disclaimer, it is necessary to "look through form to substance." If the union's court action relates to an underlying but not yet resolved representation issue, the court cannot assume jurisdiction. 325 F.2d at 579.

International to be precisely on point. The Ninth Circuit, however, refused to apply *Texas International,* attempting to draw a distinction between the two cases. No such distinction exists in reality, however. True, the Second Circuit in *Texas International* noted in dictum that courts might have jurisdiction under the Act to prevent a carrier from terminating the work of its own pilots and transferring that work to an "alter ego" carrier. 656 F.2d at 19. That dictum is not a proper statement of the law because even under such a hypothetical, a representation dispute within the exclusive jurisdiction of the NMB would nonetheless exist.

That dictum is irrelevant here, however, because ALPA never alleged in the instant case that any Transamerica pilots lost their jobs as the result of the creation of TIA,[5] as indeed it could not have. All ALPA alleged was that TIA was created to operate in Transamerica's "marketplace"—a term that is meaningless in light of the fact that as a charter carrier under deregulation, Transamerica could carry passengers or freight *anywhere in the world.* The Ninth Circuit interpreted ALPA's claim below to be that new flying opportunities might at some time in the future be diverted to non-ALPA TIA

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5. Transamerica ceased flight operations on September 30, 1986 and its remaining assets are being disposed of. ALPA challenged the lawfulness of that shutdown in a separate lawsuit in the Eastern District of New York, and the court upheld the shutdown and denied preliminary injunctive relief. *Air Line Pilots Association v. Transamerica Airlines,* 123 L.R.R.M. 2682 (E.D.N.Y.), *appeal dismissed,* No. 86-8084 (2d Cir. 1986). TIA was sold to an outside entity on March 31, 1987. These events occurred as the result of Transamerica Corporation's decision to remove itself from the airline business as well as other businesses not related to its core insurance and financial service enterprises. These events were not the subject of the instant action, moreover, since they all occurred well after ALPA filed its complaint.

pilots instead of ALPA-represented Transamerica pilots, A10-11, and found *Texas International* to be distinguishable on that basis. However, that prospect existed in a much *greater* magnitude in *Texas International* in that NYA's flying routes which TXI was authorized to fly foreclosed the possibility that TXI would expand its own operations to include those routes. This fact did not deter the Second Circuit from finding that a representation dispute existed in that case and that the courts lacked jurisdiction.

Thus, the Ninth Circuit below failed to distinguish *Texas International* in any meaningful way. The representation issue is no less present in the instant case than in *Texas International*, and the Ninth Circuit's decision stands in direct conflict with that of the Second Circuit.

C. The NMB Routinely Adjudicates Claims Such As Those Which ALPA Has Raised Here, and ALPA Has Sought Such an Adjudication From the NMB in This Case

As this Court recognized in *M-K-T, supra*, Section 2, Ninth of the Act gives the NMB the sole adjudicatory function in the settlement of representation disputes. 320 U.S. at 330. The NMB routinely exercises this adjudicatory function in resolving issues of "single carrier" or "alter ego" status; it has adjudicated fifteen such cases since airline deregulation alone.[6] As the NMB explained in *Pan American World Airways*, 7 N.M.B. 170 (1979):

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6. *Delta Air Lines/Western Air Lines*, 14 N.M.B. 291 (1987); *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 (1987); *Western Pacific Railroad*, 12 N.M.B. 160 (1985); *National Railroad Passenger Corp. (AMTRAK)*, 12 N.M.B. 80 (1985); *Winston Salem Southbound Railway*, 11 N.M.B. 255 (1984); *Texas Pacific-Missouri Pacific Terminal Railroad*, 11 N.M.B. 245 (1984); *Seaboard System Railroad*, 11 N.M.B. 217 (1984); *Fron-*

(Continued on following page)

> The purpose of the Railway Labor Act is to provide employees of covered carriers with a free choice as to their collective bargaining representative. The Act does not contemplate that carriers will be able to frustrate such rights by the use of corporate shells which are in fact created for other purposes and *the National Mediation Board will look behind such devices to determine the appropriate operating entity, thereby allowing employees the rights which are granted to them.*

Id. at 170 (emphasis added). Similarly, as the NMB reasserted just recently, "In fulfilling its responsibilities under Section 2, Ninth, the Board may 'pierce the corporate veil for purposes of rational labor-management relations.'" *Delta Air Lines/Western Air Lines,* 14 N.M.B. 291, 301 n.1 (1987). The NMB is thus entirely capable of resolving the claims ALPA has raised in its complaint before the District Court. ALPA is not without a forum or remedy for its claims. *Cf. Switchmen's Union, supra,* 320 U.S. at 300.

In fact, ALPA has raised before the NMB the same claims and arguments placed before the District Court below. Just prior to filing its complaint in this case, ALPA filed with the NMB a "Petition for Clarification of Carrier Status and for Technical Amendment of Certification" (Appendix F hereto), in which it sought to have its certification to represent Transamerica pilots extended to cover TIA pilots as well, and in which it raised

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Footnote continued—

tier Holdings, Inc., 11 N.M.B. 138 (1984); *Air Cargo, Inc.,* 10 N.M.B. 166 (1983); *North Carolina Ports Railway Commission,* 9 N.M.B. 398 (1982); *Mercury Services, Inc.,* 9 N.M.B. 104 (1981); *Texas Air Corp.,* 8 N.M.B. 488 (1981); *Ground Services, Inc.,* 8 N.M.B. 112 (1980); *Republic Airlines,* 8 N.M.B. 49 (1980); *Air Florida,* 7 N.M.B. 61 (1979).

the identical "alter ego" argument presented to the courts below.[7] Moreover, soon after filing its complaint in the District Court, ALPA wrote to the NMB notifying it of the pending lawsuit and complaining that ALPA was "in the untenable position of being unable to bargain for the entire craft or class within which bargaining appropriately should take place," and that the "company's *refusal to bargain with respect to the overall scope of the craft* has plainly impeded the processes of the Act." A49 (emphasis added). ALPA's own expressed view of the instant dispute thus only reinforces its representational nature.

D. This Case Presents Issues Much Like Those in A Pending Case in Which Justice O'Connor Rejected a Similar Ruling of the Ninth Circuit

The Ninth Circuit failed to recognize the NMB's exclusive jurisdiction over representation disputes in another recent case as well. In *International Brotherhood of Teamsters v. Western Air Lines*, 813 F.2d 1359 (9th Cir. 1987), the Ninth Circuit enjoined the merger of Western Airlines and Delta Air Lines in response to a union suit to compel arbitration of successorship grievances, and over the carriers' objection that the dispute was a representation dispute solely within the NMB's jurisdiction.

Justice O'Connor stayed the Ninth Circuit's injunction, however. She explained:

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7. The NMB dismissed ALPA's petition as improperly brought, but stressed that its dismissal did not prevent ALPA from properly "raising these issues within the context of an Application for Investigation of Representation Dispute pursuant to Section 2, Ninth of the Railway Labor Act." *Transamerica Airlines*, 12 N.M.B. 204 (1985). ALPA subsequently re-filed its petition, which is presently pending before the NMB (Case No. CR-5803).

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit *casts grave doubt on the validity of the Ninth Circuit's action in this case.*

Western Airlines v. International Brotherhood of Teamsters, 94 L. Ed. 2d 744, 749 (1987) (emphasis added). Justice O'Connor went on to note the rule recognized by every circuit except the Ninth that "[a] court may not entertain an action involving [a representation] dispute *even if it arises in the context of otherwise justiciable claims.*" *Id.* (emphasis added). The basis of the Ninth Circuit's decision below, that "federal courts have subject matter jurisdiction over claims alleging the establishment of a replacement subsidiary to the extent that those claims are actually within the purview of 45 U.S.C. § 152, Third and Fourth," A8-9, is directly contrary to this principle.

Justice O'Connor in *Western Airlines* then cited the "overwhelming and well-developed case law," including *Air Line Pilots Association v. Texas International Airlines, supra*, holding that the NMB has exclusive jurisdiction over alleged violations of the Act that involve representation issues. Justice O'Connor concluded:

> The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicants are likely to prevail on the merits.

94 L. Ed. 2d at 750. Upon the motion of the unions involved, this Court refused to vacate Justice O'Connor's ruling, 55 U.S.L.W. 3675 (1987), and a Petition for Certiorari was filed May 20, 1987, *sub nom. Delta Air Lines v. International Brotherhood of Teamsters*, No. 86-1855.

As in *Western Airlines,* the Ninth Circuit's divergence in this case from the otherwise unanimous body of court of appeals authority requires this Court's review. Virtually all of the railroads and airlines governed by the Act operate in multiple circuits. To allow a situation to continue in which federal courts in some circuits have jurisdiction over representation issues under the Act, but only the NMB has jurisdiction in others, would promote forum shopping of the most blatant kind. It also would result in an eventual emasculation of the NMB's authority to determine representation questions whenever some collateral issue could be posed by an ingenious plaintiff. This Court therefore should grant certiorari in order to preserve the NMB's jurisdiction and provide a uniform, nationwide resolution of this important question.

II. THE NINTH CIRCUIT IMPROPERLY AUTHORIZED THE DISTRICT COURT TO INTERFERE WITH THE NMB'S MEDIATORY JURISDICTION; ITS DECISION IMPROPERLY INTERJECTS THE COURT INTO THE HEART OF THE COLLECTIVE BARGAINING PROCESS AND PERMITS A PARTY TO DISCOVER ITS OPPONENT'S BARGAINING STRATEGY DURING NEGOTIATIONS

In holding that federal courts may hear lawsuits challenging the substance of a party's economic proposals in collective bargaining while negotiations continue under the jurisdiction and supervision of the NMB's mediators, the Ninth Circuit ignored the unique design of the Act, which commits regulation of the parties' bargaining conduct to NMB mediation. In addition, the Court of Appeals ignored the reality of collective bargaining negotiations, in which both parties often lead with rather extreme

positions and it is not until such negotiations have been completed that the total picture becomes apparent. Moreover, the Ninth Circuit opened the door to widespread abuse and disruption of the collective bargaining process by allowing a party to collective bargaining to file a lawsuit and pursue discovery of its adversary's negotiating strategy while negotiations continue. Finally, the Ninth Circuit ignored the principle repeatedly embraced by this Court, that courts are not to pass judgment upon the substance of a party's economic proposals in collective bargaining.

A. Congress Intended That the NMB's Jurisdiction Over Collective Bargaining Would Be Exclusive While Parties Are in Mediation

In its decision below, the Ninth Circuit ignored the fundamental precept of the Act that collective bargaining disputes in the railroad and airline industries are to be resolved, at least initially, through mediation and not through judicial intervention.

As this Court recently recognized in *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees,* 95 L. Ed. 2d 381 (1987), the Act was a unique solution to labor problems in the transportation industry that was developed by representatives of management and labor, and designed to cure the decades of labor unrest resulting from prior legislative schemes. *Id.* at 397. As this Court maintained in *Burlington Northern,* the Act "cannot be appreciated apart from the environment out of which it came and the purposes for which it was designed to serve." *Id.* The "environment" out of which the Act came was one in which the use of mediation to settle railroad labor controversies was pervasive. As

Donald Richberg, the union spokesman for the agreement between management and labor that ultimately became the Act, testified before Congress:[8]

> [T]he record of mediation is a great record of success. It is a record of sustaining the principle of persuasion as against the principle of compulsion. And all parties presenting this bill are seeking now to return to this form of Government intervention in industrial differences which has shown in the past the greatest measure of success.

Hearings on H.R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 14 (1926) (hereinafter "Hearings"). Thus, mediation and conciliation, not judicial intervention, were at the heart of the legislation that became the Act.

Section 5, First of the Act sets forth the procedure by which parties to collective bargaining may invoke the jurisdiction of the NMB. When the NMB's jurisdiction has been invoked, the Act requires that agency to "use its best efforts, by mediation, to bring them to agreement." The NMB's mediators meet with the parties both separately and together to attempt to persuade them to reach agreement. The Act vests the NMB with *absolute discretion* as to how long to hold the parties in mediation. Only if the NMB has determined that no agreement is possible may it then proffer arbitration to the parties, and if such is refused, release the parties to self-help after a 30-day "cooling off" period. 45 U.S.C. § 155, First. The NMB enforces the duty to bargain in good

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8. In *Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570, 576 (1971), this Court declared that Richberg's testimony before Congress is "entitled to great weight in the construction of the Act."

faith by holding a recalcitrant party in mediation (and thus preventing it from engaging in self-help in support of its position) until the NMB's mediator is satisfied that such party has made every reasonable effort to reach agreement. As the court in *International Association of Machinists v. NMB*, 425 F.2d 527 (D.C. Cir. 1970), explained:

> For there is woven with the conduct of the mediation process some judgment born of experience and intuition, that calculates the possibility of settlement in light of an assessment of motives and possibly even the *bona fides* of the conduct of each party.

425 F.2d 540.

Nowhere does the Act authorize the courts to become involved in this mediation process. As this Court itself stressed in *M-K-T, supra*, "*[t]he concept of mediation is the antithesis of justiciability.*" 320 U.S. at 337 (emphasis supplied). It is clear that the Act's framers felt that, absent extreme circumstances, the courts should not interfere with the mediation process. As Richberg testified in the hearings on the Act:

> I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, *if they refused absolutely to confer, to meet or discuss or negotiate*, I think there is a question as to whether there might not be invoked some judicial compulsion. . . . *But outside of that*, if the parties do not make an agreement, I think you face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and second, if that effort was unsuccessful, whether they could bring them to refer that dispute

> to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment.

Hearings at 66 (emphasis added). No such extreme circumstances are present in this case. The evidence before the courts below was undisputed that Transamerica and ALPA met and negotiated in numerous bargaining sessions prior to the filing of this action. A50-51. There can be no claim that Transamerica refused to "confer, to meet or discuss or negotiate" with ALPA.

The Ninth Circuit thus completely ignored the background and purpose of the Act in holding that the District Court may force the NMB's mediator to step aside[9] and have the District Court enmesh itself in the continuing negotiations to evaluate the substance of the parties' proposals to date. Such a view not only is completely contrary to the Act's design, but it disregards as well the very nature of the bargaining process, in which parties typically lead with one-sided proposals.

ALPA's basic claim is that Transamerica demanded too much in its concessionary proposals. In its brief to the Ninth Circuit, ALPA complained that "Transamerica has not moved at all from its draconian demand for a 50-percent wage cut." Plaintiff-Appellant's Brief at 8. But a court cannot determine the *bona fides* of a party's bargaining position until its final proposals have been put on the table and an impasse has been reached. To examine a party's position out of context at an intermediate stage of negotiations invites a distorted view. Tactics and strategy

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9. After filing its lawsuit, ALPA specifically requested that the NMB suspend mediation pending resolution of ALPA's court action. *See* A49.

may dictate that a party take an initial position with a view toward assuming a very different ultimate position; *e.g.*, taking an initial hard line on issue X anticipating an eventual trade of X for Y.[10] Allowing a court to become involved in negotiations before they are complete is akin to going into a darkroom while film is still developing to determine whether the finished photograph will be out of focus. It would be impossible at that point for a court to glean a party's ultimate intentions from its bargaining maneuvers.

It is important to note that the District Court below dismissed ALPA's lawsuit *without* prejudice to ALPA's right to reinstate it after bargaining and mediation had been completed. As such, Section 2, First would not be rendered unenforceable, as ALPA argues, by requiring a court to withhold intervention merely until the NMB has completed the statutory mediation process.

For the same reason, this Court's ruling in *Chicago & North Western, supra,* does not support the Ninth Circuit's decision below. In *Chicago & North Western,* a carrier brought suit challenging the good faith of the union's bargaining conduct, and to enjoin a threatened strike, after the NMB had released the parties from mediation and relinquished jurisdiction. 402 U.S. at 573-74. This Court held that Section 2, First of the Act was enforceable by the courts "*after* the entire statutory scheme has run its course." *Id.* at 596 (Brennan, J., dissenting) (original emphasis). This Court in *Chicago & North Western* never

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10. As the District Court below observed:

> Bargaining sometimes means stonewalling for awhile. Making offers. Trying out different theories. So, I think it is inappropriate in this case for this court to allow a case to go forward challenging lack of good faith until the bargaining is over. When it is over, we can look at it.

A20.

addressed the situation presented in the instant case. It is true that this Court stated that Section 2, First should not be enforceable *only* by the NMB's timing of the release of the parties from mediation, *id.* at 582, but Transamerica has never disputed that principle. Transamerica's point is simply that a court should not interject itself into the bargaining process until the parties' bargaining positions have become clearly established, and the NMB has finished its statutorily-assigned task of mediation. This Court therefore should grant certiorari here to correct the Ninth Circuit's encroachment upon the mediatory jurisdiction of the NMB, and to clarify the reach of *Chicago & North Western* in the instant situation.

B. The Ninth Circuit's Ruling Permits a Party to Disrupt the Collective Bargaining Process by Use of Discovery to Learn of Its Opponent's Bargaining Strategy

In holding that courts have jurisdiction over bad faith bargaining claims *before* negotiations and NMB mediation have been completed, the Ninth Circuit has authorized parties to collective bargaining to file lawsuits and use the federal court discovery process to expose their opponents' bargaining strategies and ultimate "bottom line."

Such was precisely ALPA's object in the instant litigation. Immediately upon filing its lawsuit, ALPA deposed several senior Transamerica management officials concerning Transamerica's bargaining goals and strategies. For example, while negotiations were still underway, ALPA asked Ernest Eastman, Manager of Labor Relations and a member of Transamerica's bargaining team, "Would you describe[] the process for me of how the company decided what it wanted to achieve in those negotiations for a new agreement with ALPA?" A67. ALPA asked

Transamerica Vice Chairman Howard Korth, "What was said [in Transamerica Board of Directors meetings] about the company's plans should a strike ensue?" A59, and whether there was "any benchmark figure that the company was trying to achieve in concessions" from ALPA. A54. ALPA inquired of Senior Director of Operations Hank Bathey, "Has the company made any plans to hire any replacement pilots should there be a strike?" A70.[11] Finally, during the interrogation by ALPA's counsel, James Linsey, of Ernest Eastman concerning Transamerica's plans to operate in the event of a pilot strike, counsel for Transamerica, William F. Kaspers, objected: "I don't think it would be appropriate to delve into contingency arrangements under the guise of this lawsuit." Linsey responded. *"That is what this lawsuit is all about."* A67.

The whole institution of collective bargaining in the railroad and airline industries will be disrupted if the Ninth Circuit's ruling is permitted to stand. As noted previously, collective bargaining by its nature involves the planning and execution of careful strategies, as well as a certain amount of posturing, on both sides. The collective bargaining process simply cannot operate if the parties can rush into court with "bad faith bargaining" claims and counterclaims and proceed to discover one another's goals and strategies while bargaining continues. The Act, which places so much emphasis upon collective bargaining, could never have contemplated such an absurd result. This Court must grant certiorari in this case to prevent such a deterioration of the collective bargaining process.

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11. Excerpts from the Eastman, Korth and Bathey depositions setting forth these lines of questioning in their entirety are set forth at A52-70.

C. The Ninth Circuit's Decision Conflicts With This Court's Long-Standing Rule That Courts May Not Order Parties in Negotiation to Modify the Substance of Their Economic Proposals

The essence of ALPA's "bad faith bargaining" claim in this litigation is that, at the time of filing suit, Transamerica had not yet offered proposals of wages and benefits in the course of negotiations that ALPA deemed satisfactory. If the District Court were to award relief on such a claim, it would have to order Transamerica to modify its bargaining stance in the midst of negotiations.

Courts clearly lack authority to issue such an order, however. It is basic to our national labor policy that courts may not force parties in collective bargaining to reach agreements, or impose particular terms upon a party. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), this Court explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake government regulation of wages, hours or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed in those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. *The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.*

Id. at 6 (emphasis added).

Similarly, in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the employer steadfastly refused to accept the union's proposal for a dues-checkoff clause in the contract under negotiation. The NLRB found that the employer's refusal constituted bad faith bargaining. This Court reversed, holding that the NLRB is without power to order a party to modify its substantive bargaining proposals.

This Court maintained that

> [I]t was recognized from the beginning that agreement might in some cases be impossible, and *it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.*

Id. at 103-04 (emphasis added). *Accord, NLRB v. American National Insurance Co.*, 343 U.S. 395, 408-09 (1952). Finally, this Court in *Chicago & North Western, supra,* recognized the "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579 n.11.

Concessionary bargaining is a fact of life in the post-deregulation airline industry.[12] As the NMB's *Fiftieth Annual Report* (1984) said of the period which gave rise to this action:

> Fiscal 1984 was a period of concessionary bargaining, with airlines negotiating for wage cuts and freezes . . . and more productive work rules. On the union side there was resistance to such changes and mediation frequently became a prolonged and difficult procedure.

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12. *See generally Northrup, The New Employee-Relations Climate in Airlines*, 36 Indus. & Lab. Rel. Rev. 167, 169, 180 (1983).

Id. at 4. Most airlines have been forced to seek wage and work rule concessions from their employees in order to survive in today's intensely competitive marketplace. The Ninth Circuit's ruling below, however, will permit unions to tie up carriers in federal court litigation in attempts to avoid the economic realities of the marketplace. The Ninth Circuit's ruling is inconsistent with this Court's repeated holdings that the courts and the NLRB lack jurisdiction to examine the substance of a party's economic proposals. Likewise, by allowing unions to disrupt negotiations and embroil carriers in massive litigation over such issues, the Ninth Circuit's decision is fundamentally inconsistent with the Act's emphasis upon settlement of disputes through negotiation and mediation. This Court should grant certiorari in order to correct these serious errors.

CONCLUSION

The Ninth Circuit's decision below radically departs from the basic design of the Act, and from this Court's and other courts' consistent interpretations of the Act. The Ninth Circuit's holding with respect to federal court jurisdiction in representation disputes, if not corrected, will likely cause blatant forum shopping and massive confusion and inconsistency in the law. Its holding with respect to federal court jurisdiction over bad faith bargaining claims, if allowed to stand, will threaten the very institution of collective bargaining in the railroad and airline industries. For these reasons, Transamerica submits that this Court should grant certiorari in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2455
D.C. No. CV-85-2803-SW

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellant,

v.

TRANSAMERICA AIRLINES, INC.,
Defendant-Appellee.

ORDER AND AMENDED OPINION

Filed May 14, 1987
Amended July 1, 1987

Before: Herbert Y. C. Choy, Alfred T. Goodwin and Harry Pregerson, Circuit Judges.

Opinion by Judge Pregerson

Appeal from the United States District Court
for the Northern District of California

Spencer Williams, District Judge Presiding

COUNSEL

Michael E. Abram, James Linsey, New York, New York for the plaintiff-appellant.

James E. McDonald, Jr., Atlanta, Georgia, for the defendant-appellee.

ORDER

The opinion filed May 14, 1987, is amended as follows: Footnote 1 on page 4 of the original opinion is deleted. In lieu thereof, the following text is inserted:

We hold that this case is not moot because effects bargaining may continue despite the cessation of flight operations, because the complaint seeks damages in addition to injunctive relief, and because the wrongs alleged may be capable of repetition yet evading review.

OPINION

PREGERSON, Circuit Judge:

While the Air Line Pilots Association, International ("ALPA") and Transamerica Airlines ("Transamerica") were in the process of negotiating a new collective bargaining agreement, and while the parties were in mediation to assist this process, ALPA filed the instant suit against Transamerica. The complaint alleges that Transamerica violated the Railway Labor Act ("the Act") by refusing to bargain and by establishing a nonunion replacement subsidiary to which Transamerica would divert business. Transamerica moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and the district court granted the motion. ALPA appeals the dismissal of the complaint.

We hold that the district court had subject matter jurisdiction over both alleged violations and that both violations give rise to claims upon which relief can be granted.

BACKGROUND

ALPA is the exclusive collective bargaining representative under the Act for pilots employed by Trans-

america. In March 1984, ALPA and Transamerica began negotiating the terms of a new collective bargaining agreement. The parties jointly invoked the assistance of the National Mediation Board ("the Board") in July 1984 and have been involved in mediation since that time. On March 27, 1985, ALPA commenced the instant action against Transamerica.

The complaint alleges that Transamerica, together with its corporate parent, Transamerica Corporation, formulated a plan to institute pay scales without the approval of ALPA; that to further this plan, Transamerica entered into collective bargaining negotiation with ALPA, but failed and refused to exert reasonable efforts to reach agreement or bargain in good faith; and that Transamerica acted with its corporate parent to achieve the plan's wage-lowering goal by establishing a separate subsidiary to operate in Transamerica's marketplace. The complaint also alleges that Transamerica threatened to terminate its operations. Count I of the complaint alleges that this conduct violates 45 U.S.C. § 152 First. Count II alleges that this conduct violates 45 U.S.C. § 152 Third and Fourth.

Affidavits from the parties describe the following additional facts. On or about August 11, 1986, Transamerica announced its intention to cease all flight operations. On September 30, 1986, Transamerica ceased all flight operations. Transamerica pilots were permanently furloughed effective October 2, 1986. Transamerica stated that it is going out of business permanently. For this reason, Transamerica moved after the completion of briefing to dismiss this appeal as moot.[1]

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1. We hold that this case is not moot because effects bargaining may continue despite the cessation of flight operations, because the complaint seeks damages in addition to injunctive relief, and because the wrongs alleged may be capable of reptition yet evading review.

DISCUSSION

Disposition of a motion to dismiss for lack of subject matter jurisdiction and disposition of a motion to dismiss for failure to state a claim are both reviewed de novo by this court. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986) (subject matter jurisdiction); *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984) (failure to state a claim). The reviewing court must, with respect to both motions, construe the allegations of the complaint favorably to the plaintiff, and must dismiss the complaint only if no set of facts could be proved that would entitle the plaintiff to relief under the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974).

I. *Enforcement While Mediation is in Progress*

45 U.S.C. § 155 First establishes a procedure for settling disputes between employees and the carrier concerning, *inter alia*, changes in pay, rules, and working conditions. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). When such a dispute arises, both parties or either party as part of that procedure may invoke the services of the Board, which "shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration . . . ." 45 U.S.C. § 155 First.

The Act imposes a number of restrictions upon the conduct of the parties throughout the dispute-settlement procedure. These restrictions include "the duty of all

carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . . ." 45 U.S.C. § 152 First.

A. *Subject Matter Jurisdiction*

The district court held that there is no subject matter jurisdiction over a claim under 45 U.S.C. § 152 First while mediation conducted by the Board is in progress. In support of this holding, Transamerica makes two arguments.

[1] The first is that mediation is a sensitive process that will suffer as a result of judicial interference. In support of this argument, Transamerica cites *International Association of Machinists v. National Mediation Board*, 425 F.2d 527 (D.C. Cir. 1970), which held that courts have only limited jurisdiction to scrutinize the Board's decision not to terminate mediation. But this case is not on point. The question whether federal courts have jurisdiction to review Board decisions is not the same as the question whether federal courts have jurisdiction to enforce provisions of the Act. This distinction is central to the Supreme Court's decision not to allow judicial review of the Board's certification of representatives. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 305-07 (1943). Transamerica has presented no case in which deference to the mediation process has restricted the ability of federal courts to enforce the provisions of 45 U.S.C. § 152 First.

Transamerica's second argument is that ALPA has presented no case in which a court has allowed enforce-

ment of 45 U.S.C. § 152 First while mediation was in progress. This assertion is accurate. Federal courts, however, do have jurisdiction to enforce the provisions of 45 U.S.C. § 152 First. In *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971), which involved a suit commenced after mediation had been terminated, the Court stated:

> [W]e think the conclusion inescapable that Congress intended the enforcement of § 2 First [45 U.S.C. § 152 First] to be *overseen by appropriate judicial means* rather than by the Mediation Board's retaining jurisdiction over the dispute or prematurely releasing the parties for resort to self-help if it feels such action is called for.

Id. at 582 (emphasis added).

[2] Transamerica has presented no authority restricting federal jurisdiction while mediation is in progress. Similarly, ALPA has presented no case involving litigation undertaken to enforce 45 U.S.C. § 1522 First while mediation was in progress. Because *Chicago & North Western* instructs that enforcement of 45 U.S.C. § 152 First is to be "overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction," we conclude that subject matter jurisdiction exists.

The district court in its oral ruling held that it lacked subject matter jurisdiction because it saw "a technical problem of being able to file a lawsuit while bargaining is going on, and then being able to take depositions of the people who are negotiating and screw up the strategy." Similarly, Transamerica argues that there is no subject matter jurisdiction because deference to the discretion of the Board must be exercised in light of the fact that

"[c]ollective bargaining under the supervision of a National Mediation Board mediator involves many intricate strategic and tactical moves by both parties." These prudential considerations do not, however, speak to the issue of subject matter jurisdiction, which is governed by congressional enactment, and not judicial prudence.[2]

B. *Failure to State a Claim*

[3] Transamerica contends that ALPA has failed to allege a violation of 45 U.S.C. § 152 First. In the complaint, however, ALPA alleges that "Transamerica has entered into collective bargaining negotiations with ALPA, ostensibly to conclude a new collective bargaining agreement, but in those negotiations it has failed and refused to exert reasonable efforts to reach agreement with ALPA or otherwise to negotiate in good faith with ALPA." This alleged activity violates the requirement in 45 U.S.C. § 152 First that carriers "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes."

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2. To the extent that Transamerica does attempt to show that Congress did not provide for subject matter jurisdiction under these facts, it refers to the testimony of Donald R. Richberg at the House hearings on the proposed Act. The testimony excerpt is intended to support the proposition that judicial intervention into collective bargaining under the Act should be limited to outright refusals to bargain. Yet the portion quoted by Transamerica contains the following: "if they [either party] refused absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion . . . ." Hearings on H.R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 66 (1926). The complaint alleges that Transamerica "has failed and refused . . . to negotiate in good faith with ALPA," which is tantamount to refusal "to negotiate" as stated in the Richberg quote. It is largely on the basis of the Richberg testimony that the Supreme Court held that subject matter jurisdiction does exist generally over 45 U.S.C. § 152 First. *See Chicago & North Western*, 402 U.S. at 576-77.

See Chicago & Northwestern, 402 U.S. at 580 n.11; *Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters,* 650 F.2d 949, 962 (9th Cir. 1980), *cert. denied,* 449 U.S. 1110 (1981) ("The Supreme Court in [*Chicago & North Western*] held that [45 U.S.C. § 152 First] imposed a substantive duty on parties, enforceable by injunctive relief, to exert reasonable efforts during the negotiation process to reach an agreement.") Thus, the ALPA complaint states a claim under 45 U.S.C. § 152 First.

II. *Creation of a Replacement Subsidiary*

In addition to 45 U.S.C. § 152 First's requirement that the parties exert reasonable efforts to make and maintain agreements and settle disputes, the Act requires, *inter alia,* that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives," 45 U.S.C. § 152 Third, and that "it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." 45 U.S.C. § 152 Fourth.

A. *Subject Matter Jurisdiction*

[4] Federal courts have jurisdiction to enforce the provisions of 45 U.S.C. § 152 Third and Fourth prohibiting interference with effective representation and organization. *Virginian Ry. Co. v. System Fed'n No. 40,* 300 U.S. 515, 543 (1937); *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 569 (1930); *Ruby v. TACA Int'l Airlines,* 439 F.2d 1359, 1364 (5th Cir. 1971); *Brotherhood of Ry. Trainmen v. Central of Ga. R.R. Co.,* 305 F.2d 605, 608-09 (5th Cir. 1962). Thus, federal courts have subject matter jurisdiction over claims alleging the estab-

lishment of a replacement subsidiary to the extent that those claims are actually within the purview of 45 U.S.C. § 152 Third and Fourth.

The district court held that the claims concerning the replacement subsidiary involve a representational dispute falling under 45 U.S.C. § 152 Ninth, not a dispute under 45 U.S.C. § 152 Third or Fourth, and for that reason subject matter jurisdiction is lacking.[3] The district court in so holding relied upon the Second Circuit decision in *Air Line Pilots Association, International v. Texas International Airlines*, 656 F.2d 16 (2d Cir. 1981).

In *Texas International* the corporate parent of an existing airline underwent a corporate restructuring whereby a new subsidiary was created to service a route that the existing airline subsidiary had *not* serviced, but that the existing subsidiary was authorized to service. ALPA, the plaintiff union in the *Texas International* case, asserted that pilots employed by the new subsidiary must be covered by the collective bargaining agreement made with the existing subsidiary. The Second Circuit held that the suit constituted a representational dispute under 45 U.S.C. § 152 Ninth, and therefore that the courts did not have subject matter jurisdiction over it. The court's holding was, however, a restricted one.

The court distinguished acts giving rise to jurisdiction under § 152 Third and Fourth from those that could give rise only to representational disputes. In the first category it placed such acts as transferring existing business flown by ALPA pilots to a newly formed corporate

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3. Representational disputes under 45 U.S.C. § 152 Ninth are disputes over "whether one organization or another was the proper representative of a particular group of employees." *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 302 (1943). Courts have no jurisdiction over Board determinations in such disputes. *Id.* at 305-06.

alter ego in order to take work from the union. 656 F.2d at 19. In the second category, it placed such acts as forming a separate, fully independent company to serve routes neither flown nor certificated to the preexisting carrier. *Id.* In *Texas International,* the preexisting subsidiary had never flown the routes assigned to the new subsidiary, although it was authorized to do so. Therefore, the court found that the facts fit in the second category, and gave rise to a representational dispute within the exclusive jurisdiction of the Board.

In the instant case, the complaint alleges that Transamerica, along with its corporate parent, acted "to devise a second airline subsidiary for [the corporate parent] to operate in Transamerica's marketplace." Consequently, the instant case is closer to the first category noted in *Texas International,* where the carrier seeks to "transfer existing business flown by ALPA pilots to a newly formed corporate alter ego for the purpose of displacing the work of ALPA pilots," *id.*, and, therefore, is an interference with representation and organization within the purview of 45 U.S.C. § 152 Third and Fourth.

As the above discussion indicates, *Texas International* does not support dismissal for lack of subject matter jurisdiction in the instant case. In fact, it recognizes the application of 45 U.S.C. § 152 Third and Fourth to the diversion of work from a subsidiary bound by a collective bargaining agreement to a newly formed, related nonunion subsidiary that would operate in the same marketplace.

[5] We hold that a federal court has jurisdiction to hear a dispute in which an employer is alleged to have established a nonunion replacement subsidiary in order to transfer to it work being performed by an existing

subsidiary that is bound by a collective bargaining agreement.

B. *Failure to State a Claim*

ALPA asserts that the portion of the complaint referring to the creation of a replacement subsidiary states a claim both with respect to the status quo requirements of the Act and with respect to the portions of the Act prohibiting the undermining of representation and organization.

The status quo provision in 45 U.S.C. § 156, states in relevant part: "In every case where . . . the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . ." The Supreme Court described the status quo provisions of the Act generally in *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142 (1969), as follows:

> The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

Id. at 152-153. *See Trans Int'l Airlines v. International Bhd. of Teamsters*, 650 F.2d 949, 967 (9th Cir. 1980). ALPA's complaint alleges that,

> Transamerica has acted with [its corporate parent] to devise a second airline subsidiary for [the parent] to operate in Transamerica's marketplace, wholly or

> partly as a device and instrument to achieve Transamerica's goal [to dictate rates of pay and working conditions] and to further Transamerica's plan as aforesaid; in further support of that plan Transamerica has threatened to terminate its own operations.

The prospect of having work shifted to a replacement subsidiary would constitute a change in the working conditions and practices under the *Shore Line* standard. *See Local 533, Transp. Workers Union v. Eastern Air Lines,* 544 F. Supp. 1315, 1327 (E.D.N.Y. 1982), *modified,* 695 F.2d 668 (2d Cir. 1983) ("the deprivation of a work opportunity involving the type of work traditionally performed by the Union is a change in working conditions, even where the work is new.").

[6] Transamerica argues that ALPA has not stated a claim because "ALPA never alleged in its Complaint that Transamerica violated the status quo obligations of the RLA." It is true that the complaint does not mention the status quo provisions of 45 U.S.C. § 156. However, "[a] 'complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of its claim, but is sufficient if it shows that the plaintiff is entitled to *any* relief which the court can grant, regardless of whether it asks for the proper relief.' " *United States v. Howell,* 318 F.2d 162, 166 (9th Cir. 1963) (quoting *Dotschay v. National Mutual Ins. Co.,* 246 F.2d 221, 223 (5th Cir. 1957)); *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1969). Because the complaint alleges facts that would constitute a violation of 45 U.S.C. § 156, a claim has been stated.

[7] ALPA argues that it also has stated a claim by alleging that "[d]efendant's course of conduct, as described . . . above, subverts and impairs the representative stand-

ing, collective bargaining rights, and legitimate effectiveness of ALPA to represent Transamerica's pilots under the Act." ALPA's claim clearly fits within the language of 45 U.S.C. § 152 Third and Fourth. The complaint, broadly construed, alleges that Transamerica and its parent have sought to establish a subsidiary that could take over Transamerica's business but that would be unencumbered by the collective bargaining agreement with ALPA. The use of a similar "runaway shop technique to defeat the pilots' collective bargaining gains," when a carrier moved the pilot base to El Salvador in order to render ALPA's representation illegal under local law, was found to warrant injunctive relief under 45 U.S.C. § 152 Fourth. *Ruby v. TACA Int'l Airlines,* 439 F.2d 1359, 1364 (5th Cir. 1974).

Transamerica argues that 45 U.S.C. § 152 Third and Fourth cannot give rise to a claim once a union has been certified as the collective bargaining agent, and ALPA has already been certified in the present case. Transamerica cites *International Association of Machinists v. Northwest Airlines,* 673 F.2d 700 (3d Cir. 1982) for support. The *Northwest Airlines* court did state that generally 45 U.S.C. § 152 Third and Fourth would not "provide for federal court jurisdiction in an action in which a union asserts that the disciplinary measures taken by a carrier *during the existence of a collective bargaining agreement* were motivated by anti-union animus." *Id.* at 709 (emphasis in original). However, the court also stated that it does not "foreclose the possibility that given the appropriate case and the appropriate circumstances such an action could be brought in federal court." *Id.*

Furthermore *Northwest Airlines* recognized that there is authority to the contrary. The Fifth Circuit case, *Brotherhood of Railroad Trainmen v. Central of Georgia*

Railway Co., 305 F.2d 605, 608-09 (5th Cir. 1962), granted relief under 45 U.S.C. § 152 Third during the existence of a collective bargaining agreement. *Northwest Airlines* sought to distinguish *Railroad Trainmen* on the ground that it was decided merely on the pleadings. The present case, which is before this court on a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), is also being decided on the pleadings. *Northwest Airlines*, therefore, does not support Transamerica's argument.[4]

Finally, Transamerica argues that liability under 45 U.S.C. § 152 Third and Fourth once a union had been certified as the collective bargaining agent is possible only in "unusual circumstances" when there has been "some overt, unlawful act on the part of the carrier that had a demonstrable effect upon the union involved." Even if this assertion is true, at this stage in the proceedings we have no evidence that this case does not involve unusual circumstances. The portion of the ALPA complaint alleging the establishment of a replacement subsidiary states a claim under 45 U.S.C. § 152 Third and Fourth, and also states a claim under 45 U.S.C. § 156.

CONCLUSION

[8] The district court has subject matter jurisdiction over both alleged violations in the complaint in the instant case. Furthermore, both violations give rise to claims upon which relief can be granted. Therefore, the orders granting Transamerica's motions to dismiss the complaint are reversed. This action is remanded to the district court for consideration of all issues that are not moot.

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4. It should be noted that the Fifth Circuit case, *Ruby*, 439 F.2d at 1364, also involved a dispute after a union had been certified as the collective bargaining agent.

APPENDIX B

(Filed August 12, 1987)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2455

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,
Plaintiff-Appellant,

vs.

TRANSAMERICA AIRLINES, INC.,
Defendant-Appellee.

ORDER

Before: CHOY, GOODWIN, and PREGERSON, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing. Judges Goodwin and Pregerson voted to reject the suggestion for rehearing en banc and Judge Choy recommends such rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BEFORE: HON. SPENCER WILLIAMS, JUDGE

NO. C 85-2803 SW

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,
Plaintiff-Appellant,

vs.

TRANSAMERICA AIRLINES, INC.
Defendant-Appellee.

REPORTER'S TRANSCRIPT

San Francisco, California

June 5, 1985

FOR THE PLAINTIFF: James L. Linsey, Esq.

FOR THE DEFENDANT: William F. Kaspers, Esq.

[2] June 5, 1984

The Clerk: C 85-2803 SW, Airline Pilots Association vs. Transamerica Airlines.

(Appearances noted for the record)

The Court: Yes. I have read the papers. I am prepared to make a decision at this time, unless you want to add anything to what you have had in the brief. We have discussed this on the phone.

I think I said at the time when we discussed this one and the other lawsuit that it seems premature. First aspect of the lawsuit concerning bad faith, not dealing in good faith is premature since the bargaining is still going on.

I can see a technical problem of being able to file a lawsuit while bargaining is going on, and then being able to take depositions of the people who are negctiating and screw up the strategy.

Mr. Linsey: I would like an opportunity to address that.

Your Honor, the question raised by defendants, the primary question is whether or not this court has jurisdiction to entertain a complaint for alleging a violation of Section 2, First of the Railroad Labor Act before the National Mediation Board has released the [3] parties in the 30-day cooling off period.

Careful reading of the Supreme Court decision in Chicago & Northwestern Railway indicates that the Court does have jurisdiction and the Court should exercise its jurisdiction to insure compliance with Section 2, First. Chicago & Northwestern Railway was a case where the union argued that the National Mediation Board—

The Court: This is the Second Point. I want to take it under submission.

Second Point concerns whether the court has jurisdiction or the NNB has jurisdiction to determine the two entities.

Mr. Linsey: This is on the First Point. Defendant raises the point that the court should not exercise the jurisdiction to review whether or not the carrier is bar-

gaining in good faith under Section 2, First of the Railway Labor Act.

Section 2, First states plainly, your honor, that the parties must exercise every reasonable effort to make and maintain agreements under the Railway Labor Act.

The Court: In that case the negotiations terminated.

Mr. Kaspers: That is correct.

Mr. Linsey: That is correct.

The Court: Not the case here.

[4] Mr. Linsey: No, Your Honor. But we have to look at what the Supreme Court said in that case. Let's begin by looking at what the statute says.

The statute itself says "maintain agreements." It doesn't indicate on the face of the words of the statute, your honor, that the court needs to wait until the bargaining process is over before it can enforce the good-faith requirement to make and maintain agreements, because the very face of the statute says "maintain agreements."

On the very face of the statute, Your Honor, time is irrelevant. That duty attaches at all times, once the union is recognized as a collective bargaining representative, Your Honor.

Now, in Chicago & Northwestern the issue was whether or not Section 2, First—this bargaining obligation—

The Court: All these arguments are contained in your papers. I have considered them.

Mr. Linsey: Yes, Your Honor.

Your Honor, one final point here then, is that the court should understand very clearly what it would do if it denies and dismisses the complaint at this time.

Basically, Your Honor, what the court is doing is propelling and accelerating self-help. Accelerating an [5] structure, Your Honor. Because basically this is Butte Anaconda. That's the law in those cases. Also the law in Chicago & Northwestern.

When the parties do not make every reasonable effort to negotiate, to make and maintain agreements, Your Honor, what is going to happen is the—there is no recourse but for the National Mediation Board.

Recognizing the utility when one party is refusing to negotiate in good faith, the National Mediation Board recognizes the utility of continuing mediation. At that point the National Mediation Board issues a release beginning the 30-day cooling off period.

The Court: That's the process.

Mr. Linsey: That is correct. That's the process. That was the problem that the Supreme Court recognized in Chicago & Northwestern. In footnote 14 of Chicago the Supreme Court said, number one, that the obligation to bargain in good faith under Section 2, First of the Railway Labor Act is unenforceable not by the National Mediation Board but by the federal courts.

Also in that footnote, Your Honor, the Supreme Court indicated the thrust of its decision, the focus of its decision, was not to permit the position that would accelerate self-help.

The Court: Most of these cases were decided [6] after the NNB had adjudicated the issue. Anyhow, I have already decided that it is inappropriate to allow ALPA to raise this issue while the bargaining is still in process.

I had a case involving baggage handlers for Quantas. After it went over, they charged lack of good faith. Then we went through all the evidence. It was apparent that Quantas had some—their strategy was to hold back and then come in near the end with some offers, which they did. If they had—case had been filed early on it would have destroyed the strategy and would have disrupted everything. They were bargaining.

Bargaining some times means stonewalling for a while. Making offers. Trying out different theories. So I think it is inappropriate in this case for this court to allow a case to go forward challenging lack of good faith until the bargaining is over. When it is over, we can look at it.

On the second question, I would like to have you talk to that. Question of—what's the other question here?

Mr. Linsey: Your Honor, that would be the question of the creation of Trans International Airlines as an alter-ego entity, in essence, because the party, as in Butte and Anaconda, Your Honor—Butte and Anaconda almost parallels this case.

[7] They say in Butte the carrier was getting ready to open up a new rail yard. The carrier sought concession from the union. They wanted to go from five to three people on the crew. The union did not readily agree to these concessions. So what Butte—

The Court: Separate entity.

Mr. Linsey: Well, the question that the court addressed in that case was whether for purposes of the labor statute these two entities, these two corporations, Butte and Anaconda Railway and the corporation, its parent, were a single entity for labor relations purposes.

And the Ninth Circuit specifically addressed that question, Your Honor, and focused on that question. They focused on the relationship between the two corporations. They focused on the failure of the one corporation, railroad, to achieve its concessions by the railroad and then turned around and through the other corporate entities, in effect, achieved them.

The Court: Did they really discuss the single entity question in that case?

Mr. Linsey: Exactly. They specifically did and found for labor relations purposes, they were a single employer under the NLRB Act.

Two other cases of the Ninth Circuit, recent cases where the Ninth Circuit reversed district court [8] dismissals—that's the Con Iverson Trucking Company and also the Local 70.

Your Honor, in those two cases what the Ninth Circuit said is that the district courts have jurisdiction to review employers to see if they are a single entity for labor relations purposes.

The Texas Air case out of the Second Circuit is very similar. So I want to look at these cases.

The Court: Well, I will take it under submission and we'll issue a memo so we can do it very, very carefully, because there seems to be some difficulty in the Ninth Circuit approach, but it is there and you have to live with it.

Mr. Linsey: If I can point out two parallels that I think would help the court in examining the question. I will be very brief.

The Court: Are they in your briefs?

Mr. Linsey: Not specifically.

The Ninth Circuit approach on the single employer is that the District Court can review the employer and determine whether or not the employer is a single employer for labor relations purposes.

The Ninth Circuit stops, however, and says that the administrative agencies such is the NLRB, or in our case the NNB, would look at the group of employees, [9] not the employer, to see if they were a proper bargaining unit and, therefore, Your Honor, in this case this court should look and see if Trans International and Transamerica are a single employer and the NNB has a separate function Your Honor.

The NNB looks at the group of employees and says whether or not these groups of employees should be one group or two groups. But it's the District Court's function to look at the employer.

The Court: That's what the Ninth Circuit says.

Mr. Linsey: One final point. Even under the Second Circuit analysis, the critical question or the critical fact in the Second Circuit, Second Circuit admitted it was a close question, the critical fact that swayed the Second Circuit in the TIA case was that there were different markets. Texas International Airlines was operating air carrier in the southwest. There were over scheduled routes.

Now, New York Air, as that name indicates, was contemplated and did in fact operate a route from New York City to Washington D.C.

The Court: And Boston.

Mr. Linsey: But they were different routes and they were scheduled routes. In this case the [10] complaint

on its face alleges that TIA and TAA operate in the same marketplace—

The Court: Same type of equipment?

Mr. Linsey: Yes, Your Honor. In fact, they are cargo aircraft. In fact, TIA leases its equipment from Transamerican Airlines. Equipment is owned by Transamerican Airlines, Your Honor.

What occurred is a paint job. We paint the aircraft, put on Trans International Airlines, and all of a sudden we have got a new entity and we don't have to bargain.

The Court: I will take that under submission.

Mr. Kaspers: Could I interrupt? Your Honor, you are going to take that Second Point under submission? We had a motion on the discovery as well.

The Court: We will stay discovery pending decision on that.

(Recess)

APPENDIX D

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Plaintiff,

v.

TRANSAMERICA AIRLINES, INC.,
Defendant.

No. C 85-2803 SW.

United States District Court,
N.D. California.
Aug. 8, 1985.

On airline's motion to dismiss pilots union's claim that airline's creation of separate airline subsidiary subverted and impaired representative standing, collective bargaining rights and legitimate effectiveness of union to represent airline's pilots, the District Court, Spencer Williams, J., held that it lacked jurisdiction to consider single employer question.

Motion granted.

1. Labor Relations (Key) 47

While there are parallels between Railway Labor Act [45 U.S.C.A. § 151 et seq.] and other labor statutes, such parallels should be drawn with utmost care and with full awareness of differences between statutory schemes. Railway Labor Act, § 1 et seq.; 45 U.S.C.A. § 151 et seq.

2. Labor Relations (Key) 416.6

District court lacked jurisdiction over pilot's complaint alleging that airline's creation of separate subsid-

iaries subverted and impaired representative standing, collective bargaining rights and legitimate effectiveness of union to represent airline's pilots, where ultimate issue which union sought to have court determine was single employer question. Railway Labor Act, § 2, 45 U.S.C.A. § 152.

3. Labor Relations (Key) 777

Jurisdiction conferred by Labor Management Relation Act upon federal courts to enforce contracts extends to determinations of whether particular employer is bound by collective bargaining agreement. Railway Labor Act, § 3, 45 U.S.C. § 153; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations (Key) 804

Norris-LaGuardia Act [29 U.S.C.A. § 101 et seq.] prohibits issuance of injunction in Railway Labor Act [45 U.S.C.A. § 151 et seq.] case involving major dispute, but strike may be enjoined when minor dispute occurs. Railway Labor Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 151 et seq., 156; Norris-LaGuardia Act, § 1 et seq., 29 U.S.C.A. § 101 et seq.

Michael E. Abram, Jay P. Levy-Warren, James L. Linsey, Cohen, Weiss & Simon, New York City, James R. Ritchie, Henning, Walsh & Ritchie, San Francisco, Cal., for plaintiff Air Line Pilots Ass'n, Intern.

Fisher & Phillips, Ned A. Fine, San Francisco, Cal., and Robert J. Berghel, William F. Kaspers, James J. McDonald, Jr., Atlanta, Ga. for defendant Transamerica Airlines, Inc.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

SPENCER WILLIAMS, District Judge.

The matter is before the court on defendant Transamerica Airlines, Inc.'s (hereafter "Transamerica") motion to dismiss plaintiff Air Line Pilot Association, International's (hereafter "ALPA") complaint in its entirety for lack of subject matter jurisdiction and for failure to st. e a claim upon which relief can be granted. At the conclusion of the hearing on this motion, the court dismissed without prejudice the first count of plaintiff's complaint. The court requested supplemental briefing on and took under advisement that portion of the motion which pertained to the second count of the complaint.

In the second count, plaintiff contends that defendant's creation of a separate airline subsidiary "subverts and impairs the representative standing, collective bargaining rights and legitimate effectiveness of ALPA to represent Transamerica's pilots . . ., and violates right of ALPA and Transamerica's pilots to a collective bargaining relationship free of influence, interference, or coercion by defendant." ALPA contends that this conduct violates the Railway Labor Act (hereafter "RLA" or "the Act"), 45 U.S.C. § 152, Third and Fourth, which, respectively, prohibit interference with the designation of representatives and give employees the right to organize and bargain collectively without interference from a carrier. The issue is whether this claim presents a simple representation dispute, committed to the exclusive jurisdiction of the National Mediation Board ("NMB") pursuant to 45 U.S.C. § 152, Ninth, or whether the claim encompasses factors other than representation which this court has jurisdiction to entertain at this time. After careful consideration of all the argu-

ments and evidence before the court, it is hereby ordered that defendant's motion to dismiss the second cause of action is GRANTED.

FACTS

Transamerica is a charter airline engaged in the business of providing air transportation service in interstate and foreign commerce. Plaintiff ALPA is the duly authorized exclusive collective bargaining representative of the airline pilots employed by Transamerica. For many years, plaintiff and defendant have made and maintained collective bargaining agreements.

The RLA requires that the parties before the court "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes . . . in order to avoid any interruption to commerce." 45 U.S.C. § 152, First. Before disputing parties covered by the Act may resort to self-help, they are required to exhaust a procedure set out in the Act. Initially, the parties must attempt by good faith conferences to reach agreement. 45 U.S.C. § 152, Second. If the conferences fail, the parties may invoke the services of the NMB, 45 U.S.C. § 155, First, which is required to use its best efforts to bring them to agreement. If the NMB determines that a settlement through mediation is not possible, it must endeavor to induce the parties to arbitrate their controversy. *Id.* If either party refuses to arbitrate, the NMB notifies the parties that its mediatory efforts have failed; the parties then enter a 30-day cooling off period, after which time they may resort to self-help. *Id.*

ALPA and Transamerica commenced negotiations over the terms of a new collective bargaining agreement in March 1984. Unable to reach agreement, they jointly

invoked the NMB's assistance and have been engaged in mediation sessions since July 1984. On March 27, 1985, plaintiff filed its complaint in which it seeks injunctive and other relief against defendant for alleged violations of the RLA, 45 U.S.C. §§ 151 *et seq.*

In count I of its complaint, ALPA alleges that Transamerica, together with its corporate parent, "formulated and commenced to implement a plan to compel Transamerica's pilots to operate in accordance with rates of pay and working conditions to be imposed by Transamerica whether or not they would be agreed to by ALPA." Transamerica and its parent allegedly created Trans International Airline, a subsidiary, to achieve this goal. ALPA contends that although Transamerica entered into collective bargaining negotiations, it has refused to bargain in good faith and to exert every reasonable effort to make and maintain disputes and to settle disputes in a manner consistent with the requirements of 45 U.S.C. § 152, First. Because the court determined that it had no jurisdiction to entertain this claim prior to the exhaustion of the RLA's dispute resolution procedures, defendant's motion to dismiss this count of the complaint was granted without prejudice.

In the second count of the complaint, ALPA alleges that defendant's course of conduct, particularly the creation of Trans International Air, violates 45 U.S.C. § 152, First and Fourth, by subverting and impairing "the representative standing, collective bargaining rights, and legitimate effectiveness of ALPA to represent Transamerica's pilots." Essentially, ALPA believes that defendant together with its corporate parent established Trans International Air, a charter airline which allegedly operates in Transamerica's marketplace, so that work which would

otherwise be done by ALPA members will be performed by Trans International pilots. Defendant contends that the court lacks jurisdiction to entertain this claim as it raises a representation dispute committed wholly to the NMB.

ANALYSIS

The issue for the court to decide is how to properly characterize plaintiff's second claim. As will be discussed *infra*, the Second Circuit has affirmed the dismissal for lack of subject matter jurisdiction of a substantially similar claim brought by ALPA in another proceeding. Plaintiff contends, however, that the Ninth Circuit authorities in Labor Management Relations Act (hereafter "LMRA") and in an RLA case demonstrate that the exercise of subject matter jurisdiction over plaintiff's second cause of action is appropriate.

In seeking to have the second count of the complaint dismissed for lack of subject matter jurisdiction, defendant argues that ALPA's claim arises under 45 U.S.C. § 152, Ninth, which provides in relevant part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute . . .

Defendant contends that ALPA itself demonstrated that its claim raises a representation dispute when it filed with the NMB a petition for classification of carrier status, seeking a ruling on whether Transamerica and Trans International constitute a single carrier and whether

ALPA has the right to bargain on behalf of pilots employed by Trans International.

In addition, defendant argues that the claims raised by ALPA here are nearly identical to those it raised in *ALPA v. Texas Int'l. Airlines,* 656 F.2d 16 (2d Cir. 1981). In *Texas Int'l.,* ALPA was the collective bargaining representative of the pilots of Texas International. The corporate parent of Texas International established New York Air a separate, non-union airline subsidiary. ALPA alleged that this corporate restructuring constituted an effort to defeat the existing collective bargaining agreement between ALPA and Texas International. This conduct was alleged to violate Texas International's statutory duties

> "(1) to 'treat with' ALPA as the exclusive representative of (Texas International)'s pilots, § 2, Ninth; (2) to maintain the collective bargaining agreement, § 2, First; (3) to allow representatives to be designated without interference, influence, or coercion, § 2, Third; (4) to refrain from interference in the organization of the employees, § 2, Fourth; and (5) to refrain from attempting to unilaterally change rates of pay, rules, and working conditions, § 2, Seventh, § 6."

Id. at 18. Thus, ALPA's claim here that the creation of Trans International violates 45 U.S.C. § 152, Third and Fourth, essentially tracks claims ALPA made in *Texas Int'l.*

The district court's dismissal of ALPA's claims was affirmed by the Second Circuit, which noted at the outset that the case presented neither a pure representation dispute under 45 U.S.C. § 152, Ninth, nor a pure interference claim under 45 U.S.C. § 152, Third and Fourth. No traditional representation dispute existed because there was

no rival union and there had been an application to nor a certification by the NMB. Nonetheless, the court held where a representation dispute appears on the face of a complaint, the court must dismiss the action in light of 45 U.S.C. § 152, Ninth. Acknowledging that courts traditionally play a narrow role in enforcing the RLA, the Second Circuit concluded that "(n)either the framework and history of the RLA nor the cases authorizing judicial intervention under the Act", *Id.* at 24, establish that subject matter jurisdiction over this claim exists.

Were Second Circuit authority controlling here, this court clearly would lack subject matter jurisdiction over the claim before it. It is plaintiff's contention that under Ninth Circuit authority, which does control, subject matter jurisdiction does lie.

One argument that plaintiff makes in support of its position that the court possesses jurisdiction over this claim is based cases arising under the LMRA.

In *Bhd. of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir.1982) (per curiam), plaintiff filed an action under section 301(a) of the LMRA, 29 U.S.C. § 184(a), seeking a declaratory judgment that a trucking firm was bound by the union's collective bargaining agreement with a pool car distributor because the two entities constituted a single employer. The Ninth Circuit reversed the district court, which had found that it lacked jurisdiction because the National Labor Relations Board had exclusive jurisdiction over the single employer issue.

Employing the two step analysis adopted by the Supreme Court in *South Prairie Construction Co. v. Local 627, Int.'l Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (per curiam), the Ninth

Circuit determined that questions whether two entities are bound by a collective bargaining agreement "comprise two subsidiary issues", *California Consolidators,* 693 F.2d at 82. The court held that a district court "may decide under § 301 whether two companies constitute a single employer, (b)ut a single employer conclusion fails to determine that the employees form a single or an appropriate bargaining unit." *Id.* at 83 (citations omitted). The court held that under § 301 district courts have jurisdiction to decide whether employers constitute a single employer but do not have jurisdiction to determine the second part of the issue, the appropriateness of the bargaining unit. *See also Northwest Administrators v. Con Iverson Trucking, Inc.,* 749 F.2d 1338 (9th Cir.1984) (court generally has no jurisdiction to decide representational issues in NLRA cases, but under § 301 it does have jurisdiction to determine whether one company was a successor or alter-ego to another which could be bound by an agreement the other entered, and if so, to determine whether the successor or alter-ego ever effectively repudiated the collective bargaining agreement).

Plaintiff argues that the same two-step analysis must govern in this RLA case and that *California Consolidators, South Prairie,* and *Northwest Administrators* demonstrate that, at a minimum, this court has jurisdiction to consider the first part of the inquiry, i.e., whether Transamerica and Trans International constitute a single employer.

[1] While it certainly is true there are parallels between the RLA and other labor statutes, such parallels "should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago and N.W. R. Co. v. United Transportation Union,* 402 U.S. 570, 579 n. 11, 91 S.Ct. 1731, 1736 n. 11, 29 L.Ed.2d 187 (1971). *See also Bhd. of R.R. Train-*

men v. Jacksonville Terminal Co., 394 U.S. 369, 383, 89 S.Ct. 1109, 1118, 22 L.Ed.2d 344 (1969) (although cases arising under the NLRA are useful in construing the RLA, they cannot be "imported wholesale in the railway labor arena" and analogies must be drawn "circumspectly, with due regard for the many differences between the statutory schemes").

[2] Even assuming *arguendo* that the second count of ALPA's complaint raises an issue which should be analyzed under the two-part analysis originally set out in *South Prairie*, the RLA differs from the LMRA in ways which would make the exercise of jurisdiction over any part of ALPA's second claim improper.

[3] Section 301 of the LMRA[1] expressly confers jurisdiction upon federal courts to enforce contracts; that jurisdiction extends to determinations of whether a particular employer is bound by a collective bargaining agreement. In contrast, the RLA contains no corollary to § 301; rather, as will be discussed *infra*, questions of contract interpretation constitute minor disputes which must be submitted to final and binding arbitration and are subject to limited judicial review only after such an arbitration award has been rendered. *See* 45 U.S.C. § 153. Therefore, the fact that the court possesses jurisdiction to adjudicate the single employer question in NLRA cases does not indicate that it also has jurisdiction to make the same determinations in RLA cases. The statutory framework of the RLA demonstrates that Con-

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1. Section 301(a) provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction over the parties . . .

29 U.S.C. § 185(a).

gress intended that, with few exceptions, questions of contract interpretation not be brought before the courts until binding arbitration has occurred.

Plaintiff's second argument evolves from *Butte, Anaconda & Pacific Ry. v. Bhd. of Locomotive Firemen and Enginemen,* 268 F.2d 54, 58 (9th Cir.), *cert. denied,* 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959). In *Butte,* the railway established a new switching and loading yard and ascertained that its employees, who were represented by the union, were willing to perform at the new yard under work rules different from those in existence at its other yard. The railway then served upon the union a notice proposing amendments to the labor agreements, and the parties commenced negotiations on the proposed work rule changes. When the union did not agree readily to the changes the railway desired, the railway announced that the work at the new yard would be done by employees of its corporate parent. The union threatened to strike, and the railway sued to enjoin the threatened strike.

The district court dismissed the action and the court of appeals affirmed. One of the issues before the circuit was whether the controversy presented a major or a minor dispute under the RLA. Plaintiff contends that in the course of its discussion of the major/minor dispute issue, the Ninth Circuit demonstrated that this court has jurisdiction over single employer questions in RLA cases. For the following reason, the court disagrees.

Disputes under the RLA are classified either as major or minor disputes. Major disputes, which involve attempts to form collective bargaining agreements and/or change rates of pay, rules or working conditions, are resolved through the conference, mediation, and arbitra-

tion process described above. Minor disputes, which involve grievances directed to the meaning or proper application of a particular provision in an agreement, are to be resolved through arbitration which is binding upon the parties and final. *See Elgin J. & E.R. Co. v. Burley,* 325 U.S. 711, 724, 65 S.Ct. 1282, 1290, 89 L.Ed.2d 1886 (1945).

[4] In RLA cases where injunctions prohibiting a strike are sought, such as *Butte,* it is necessary as a threshold matter to determine whether a dispute is major or minor. The Norris-LaGuardia Act prohibits the issuance of an injunction in an RLA case involving a major dispute, but a strike may be enjoined when a minor dispute occurs.

It is for this reason that the *Butte* court began its analysis with an examination of whether the dispute before it was major or minor. In so doing, the court rejected the railway's contention that a major dispute had concluded when the union rejected that railway's proposal, the railway withdrew its section 6 notice, and the switching operations at the new yard were transferred to employees of the railway's parent.

In discussing the railway's last assertion—that the transfer of jobs terminated the dispute—the court stated:

> It may be assumed . . . that where an independent shipper, not acting in concert with a carrier, determines to perform its own switching service on its own property, section 6 mediation proceedings involving a dispute relative to such service are necessarily terminated.
>
> Here, however, the carrier is the wholly-owned subsidiary of the shipper . . . The two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these

> circumstances the act of Anaconda in taking over the switching service, to be performed by employees represented by another union, must be regarded as the act of the carrier. Otherwise, a carrier by interrelation with its shipper would always have it within its power to circumvent the mediation provision of the RLA.

Id. at 59-60.

Plaintiff argues that this passage demonstrates that this court has jurisdiction to consider the single employer question under the RLA. It argues that Transamerica, like the carrier in *Butte,* acted in concert with its corporate parent to use the device of separate corporations to avoid its bargaining and representation obligations under the Act.

The court rejects plaintiff's argument for two reasons. First, the factual setting in *Butte* was not similar to the one before this court. The court in *Butte* was not addressing the question whether a court has jurisdiction to consider whether two employers are bound by a collective bargaining agreement signed by one of them; instead, the court was addressing the separate issue of whether the major dispute had terminated, leaving only a minor dispute and depriving the court of jurisdiction to issue an injunction. In the course of its discussion, the court did determine that the conduct of one employer could be attributed to another, but it did so only because a threshold jurisdictional question was raised by defendant's assertion that the dispute the court was examining was a minor one.

The situation before the court in this instance does not present the same question. The resolution of the single employer question here is not a necessary precondi-

tion to the determination whether the court has jurisdiction over the case; rather, the single employer question is the ultimate issue which plaintiff seeks to have the court determine. This question simply was not before the *Butte* court.

Second, the passage quoted above does not constitute the holding of *Butte*. It merely is dicta. Because the factual situation there was so different, this dicta provides little or no guidance to this court.

In sum, the question whether this court has jurisdiction over plaintiff's second count has never been addressed directly in the Ninth Circuit. In view of the careful and convincing analysis of this issue which the Second Circuit undertook in *Texas Int'l.* and the unmistakable congressional intent, evident in 45 U.S.C. § 152, Ninth, to have representation issues in RLA cases resolved exclusively by the NMB, the court finds that dismissal of plaintiff's second count is mandated.

IT IS THEREFORE ORDERED that defendant's motion to dismiss the second count of the complaint is GRANTED.

APPENDIX E

45 U.S.C. § 152

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements

of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have the power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 155

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

APPENDIX F

BEFORE THE
NATIONAL MEDIATION BOARD
WASHINGTON, D.C.

NMB Case No.

In the Matter of:

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, involving the employees of TRANSAMERICA CORPORATION, TRANSAMERICA AIRLINES and TRANS INTERNATIONAL AIRLINES, as constituting a single carrier for purposes of §2, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. §152, Fourth and Ninth

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PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR CLARIFICATION OF CARRIER STATUS AND FOR TECHNICAL AMENDMENT OF CERTIFICATION

Air Line Pilots Association, International ("ALPA") hereby petitions for clarification of the Board's certification of ALPA in No. R-4931, 6 NMB No. 4931, to provide that ALPA is the duly authorized collective bargaining representative under the Act for the pilots employed in the airline operations of Transamerica Corporation ("TAC") as conducted under the names Transamerica Airlines ("TAA"), Trans International Airlines ("TIA") or otherwise.

TAC is a holding company which has engaged in airline operations through wholly owned subsidiaries for over fifteen years. In 1977, TAC's airline operation, then con-

ducted under the name of Trans International Airlines, Inc., merged with Saturn Airways, Inc. After an election conducted by the Board, in June, 1977, ALPA was "duly designated and authorized to represent for the purposes of the Railway Labor Act, the craft or class of Pilots, employees of Trans International Airlines, Inc., its successors and assigns." 6 NMB No. 853. In 1979, the name of TAC's airline operation was changed from Trans International Airlines to Transamerica Airlines. AFA continued to represent this craft or class of flight attendants employed in TAC's airline operations following the change in name. The most recent agreement between ALPA and TAA, amendable June 1, 1984, recognizes that ALPA has been certified to represent pilots "in the service of Transamerica Airlines. . . ."[1]

On March 9, 1984, TAC applied to the Civil Aeronautics Board to acquire complete control of a Central American International, Inc., a non-operating carrier, through various wholly owned entities, and to authorize domestic and international cargo operations in the name of Trans International Airlines, Inc. In October, 1984, the CAB issued certificates of public convenience and necessity to TIA for interstate and overseas charter air transportation, for all-cargo service, and for charter air transportation of property and mail in foreign air transportation. CAB Nos. 84-7-60, 84-10-50. TIA then applied for authority to provide charter air transportation of passengers in interstate and overseas markets, and to provide charter air transportation of passengers in foreign markets.

TAC has offered worldwide passenger and cargo charter services for military and commercial customers

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1. TAA submitted a notice of intended changes in the agreement on February 28, 1984. The parties have petitioned the Board for docketing the dispute, and are currently engaged in mediation.

through its TAA operations for many years. As described in TAC's 1982 Annual Report, "Transamerica Airlines' planes fly in and out of nearly 500 airports in more than 100 countries each year, serving both the passenger and cargo markets with charter and scheduled services." TAC has now stated its intention that "the CAI/TIA operation will ultimately be providing worldwide passenger and cargo charter services for both commercial and military customers." TAC Appl. March 9, 1984, at 7.

In its initial filings with the CAB, TAC argued that "[i]n order to expand *its air transportation services TAC* must be able to establish an operation with equipment and wage costs competitive with those of the new entrants" into "the charter market for both passenger and cargo services in both passenger domestic and international areas." TAC Appl. at 4 (emphasis added). In its initial filings, TAC offered two bases for lower costs in this market: (1) fleet standardization, based on its assertion that "the only aircraft projected for TIA's use are DC-8-61/71s to be leased from TIE" (an entity created to own the stock of TIA, and wholly owned by TAC); and (2) that TIA "will not have the burden of high labor-related costs, i.e., seniority, liberal vacation and benefit programs, that have accrued over time to the mature air carriers." TAC Ans. August 20, 1984, at 4; TAC Appl. March 9, 1984, Ex. TAC-600, p.1. The "fleet standardization" rationale was immediately undercut by TIA's subsequent filing for approval of passenger operations using "Boeing 747 aircraft or such other additional aircraft as may be necessary" for its passenger operations. TIA Appl., October 29, 1984, at 2.

The Board of Directors and Chief Executive Officer of TIA are TAC officers; the chief pilot of TIA previously served as chief pilot of TAA. It is believed that TAA has

provided substantial assistance to TIA in commencing and maintaining its operations. TIA has commenced charter operations with 1 or 2 DC-8-61s which cannot be used in domestic operations because of FAA noise restrictions. These aircraft are leased from a TAC entity. TIA operations are believed to be primarily directed towards cargo charter opportunities in Europe and the Middle East at the current time. TAA currently engages in cargo charter operations in these geographic markets, and has actively sought cargo charter opportunities in these markets.

Prior to 1984, TAC competed in the worldwide market for air charter services through its wholly owned subsidiary TAA. TAC is now attempting to provide these services through a new corporate entity, TIA. The economic justification for this new corporate entity is to have TIA avoid the "burden" of collectively bargained "high labor related costs, *i.e.*, seniority, liberal vacation and benefit programs," and the burden of Railway Labor Act obligations to make and maintain agreements concerning rates of pay, rules and working conditions for pilots engaged in these charter operations.

A carrier may not avoid its obligations to the certified representatives of its employees by changing the name of the corporate entity, or by dissolving one corporate entity and substituting another in its place without any change in ultimate ownership and control. Similarly, a carrier may not accomplish in gradual stages what cannot be accomplished in a single transaction. AFA submits that a carrier's obligation to deal with the duly designated representatives of its employees cannot be avoided by having the real party in interest (TAC, which has used TAA to operate its airline business) establish a new entity (TIA) in the identical business market served by

TAA for the ultimate purpose of TAC's/TAA's avoiding the economic costs incident to complying with the RLA.

It can hardly be questioned that stability and continuity in labor relations is a primary policy of the Railway Labor Act. At the time the Railway Labor Act was enacted, and over the course of the Board's application of the Act to the railroad and airline industries prior to deregulation, the federal regulatory schemes governing these industries discouraged changes in corporate form which would be subject to regulatory review, and thus insulated these industries from labor instability incident to these changes in a non-regulated environment. While the legal and economic context for entry into and exit from air transportation operations has been changed by the Airline Deregulation Act, which reflects a different approach to regulating business competition, Congress has not amended the Railway Labor Act to change its fundamental policy concerns with labor stability. To permit the obligations of the RLA to be negated by the device of gradually transferring business from a wholly owned subsidiary subject to a certification order to a newly created subsidiary designed to operate in the same business markets would render the Act ineffectual in achieving labor stability and avoiding disruptions in air transportation services.

Accordingly, ALPA requests that the certificate issued in R-4680, 6 NMB No. 853, be amended to add "employees of Transamerica Airlines, Inc." to the "employees of Trans International Airlines, Inc." to reflect that ALPA won the 1979 representation election for the craft or class of pilots employed in TAC's airline operation; that TAA has continued to recognize that ALPA is the certified representative of pilots employed by TAA; and that TIA, in

its current incarnation, is either a functional part of, or successor to, the airline operation which has been conducted by TAC under the names of TIA or TAA over more than fifteen years.

Dated: New York, New York
February 14, 1985

Respectfully submitted,

/s/ Jay P. Levy-Warren
Michael E. Abram
Jay P. Levy-Warren
Cohen, Weiss and Simon
330 West 42nd Street
New York, New York 10036
(212) 563-4100
Attorneys for Air Line Pilots
Association, International

APPENDIX G

AIR LINE PILOTS ASSOCIATION

1625 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 797-4000

April 16, 1985

Mr. Rowland K. Quinn, Jr.
Executive Secretary
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20572

Re: Transamerica Case No. A-11443

Dear Mr. Quinn:

A number of related matters at Transamerica affecting the status of mediation bear particular attention by the Board in its consideration of the above-referenced case.

Enclosed is a stamped file copy of the complaint against Transamerica Airlines filed by the Association on March 27, 1985. The complaint charges that the airline, together with its corporate parent Transamerica Corporation, seeks to impose rates of pay and working conditions on the Transamerica pilots whether agreed to or not, and that, accordingly, the airline has bargained in bad faith with ALPA. A key part included in this corporate program is the creation and use of Trans International Airlines as a device to further the plan.

In addition, you are well aware, of course, of the intransigent position that the airline has taken in mediation. You are also aware that the Association has requested

that the Board clarify its certification to include pilots employed within all of Transamerica Corporation's airline operations. (NMB File No. CR-5702). Given the pendency of this lawsuit and the airline's blatant bargaining posture, it is obvious that the public interest would not be served by terminating the Board's mediation effort at this time.

Moreover, with the representation matter unresolved, the Association is in the untenable position of being unable to bargain for the entire craft or class within which bargaining appropriately should take place, and is faced with considerable uncertainty in this critical juncture. The company's refusal to bargain with respect to the overall scope of the craft has plainly impeded the processes of the Act. We request therefore that the Board proceed to hearing on the representation matter and that mediation efforts resume as soon as that issue and the issues raised by the lawsuit have been resolved.

Sincerely,

/s/ Seth D. Rosen
Seth D. Rosen
Director of Representation

SDR:jae

cc: W. Wallace w/attachment
H. Duffy
R. Montag
T. Shade
M. Abram
J. Bradley
R. Domholt
P. Benoit

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO. C85-2803 SW

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,
Plaintiff,

v.

TRANSAMERICA AIRLINES, INC.,
Defendant.

AFFIDAVIT OF HAROLD L. NEFF

[71]

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AFFIDAVIT

I, HAROLD L. NEFF, being duly sworn, hereby depose and say the following:

1. I am employed by Transamerica Airlines, Inc., in the capacity of Vice President-Flight. In this capacity I have actively participated in the collective bargaining negotiations between Transamerica Airlines and the Air Line Pilots Association ("ALPA").

2. Transamerica Airlines and ALPA commenced negotiations over terms of a new collective bargaining agreement on March 14, 1984. The parties met for a number of bargaining sessions in May and June of 1984.

3. The services of the National Mediation Board ("NMB") were invoked by the parties, and the NMB docketed the matter as Case No. A-11443.

4. The NMB assigned a mediator, Charles Barnes, to supervise negotiations between the parties. The parties first met with Mediator Barnes on July 31, 1984, and continued to meet with him in negotiation sessions throughout 1984.

5. Due to the illness of Mediator Barnes, the NMB appointed a new mediator, Richard Cosgrave. The parties first [72] met with Mediator Cosgrave on January 10, 1985 and have met with him in several negotiation sessions since that date.

6. Transamerica Airlines and ALPA remain under the jurisdiction of the NMB at the present time. The NMB has not proffered arbitration to the parties or notified the parties that its mediatory efforts have failed.

I have read the foregoing statement and swear that it is true to the best of my knowledge.

/s/ Harold L. Neff
Harold L. Neff

Subscribed and sworn to before me this 19th day of April, 1985.

/s/ LaRue K. Hawkins (Seal)
Notary Public

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 85 2803 SW

AIRLINE PILOTS ASSOCIATION,
Plaintiff,

vs.

TRANSAMERICA AIRLINES, INC.,
Defendants.

DEPOSITION OF HOWARD KORTH

May 8, 1985

* * *

[55] Q. Mr. Korth, is any one director of Transamerica Airlines, Inc. more knowledgeable than the others regarding collective bargaining in general and collective bargaining on a new agreement with the Airline Pilots Association in particular?

MR. KASPERS: Objection as to form. You may [56] answer if you can.

THE WITNESS: Mr. Howard.

MR. LINSEY: Q. Does Mr. Howard, in fact, sort of assume an informal responsibility for advising the Board of Directors at each meeting the current status of collective bargaining negotiations with ALPA?

MR. KASPERS: Object to the form. You may answer.

THE WITNESS: Normally it is Mr. Howard, yes.

MR. LINSEY: Q. Do you recall Mr. Howard addressing the Board of Directors of Transamerica Airlines concerning collective bargaining, voluntary collective bargaining, for concessions with ALPA during calendar year 1983?

A. I am sure he gave us a report, but just when and where, I don't recall.

Q. Do you recall the substance of the first report that Mr. Howard gave to the Board of Directors of Transamerica Airlines?

A. Well, it followed the theme that we had lost our competitive position and the whole effort was to try to become more competitive.

Q. Mr. Howard made this presentation, is that right, made a presentation suggesting that the company should use collective bargaining with the pilots to regain [57] its competitive edge; is that right?

A. I don't recall exactly how he handled it, but your general statement is correct.

Q. Did he say how collective bargaining with the pilots would achieve this goal of regaining that competitive edge?

A. I would think only in general terms. But the answer would be yes.

Q. What were those general terms that he presented?

A. I am sure they related to pay and to working conditions.

Q. Did Mr. Howard communicate to the Board of Directors of Transamerica Airlines, Inc. any percentages of pay concessions or work concessions that the company

was trying to achieve in its collective bargaining negotiations with ALPA?

A. Not to my recollection.

Q. So to your recollection, it was a general presentation that the company would seek to regain its competitive edge simply by bargaining with the Airline Pilots Association without any specific bench mark, if you will, for that bargaining; is that right?

A. That would be correct.

Q. Have you since that time either at a Board of [58] Directors meeting or any communication with any other officers or personnel of Transamerica Airlines, Inc. learned of any bench mark figure that the company was trying to achieve in concessions from the Airline Pilots Association?

A. Yes, I have.

Q. What is that bench mark figure?

MR. KASPERS: I would instruct you not to answer if it relates to strategy or plans not yet effected.

MR. LINSEY: I am going to have a little bit of a problem with this, Bill. You know, we have tried to be cooperative here. If you are going to continue to direct the witness not to answer questions which are clearly within the realm of discovery in this court action, we are going to have to adjourn and go see the Magistrate. At this point it is just becoming obstruction of this deposition and we simply can't permit that to happen.

MR. KASPERS: Would you repeat the question?

(Record read.)

MR. KASPERS: Let me take a minute, all right?

MR. LINSEY: Certainly.

(Off the record discussion.)

MR. KASPERS: I am going to withdraw my instruction provided that the witness has an opportunity in responding to your question to explain his response to the previous question as well.

[59] MR. LINSEY: I would certainly provide the witness an opportunity to explain his previous answer to my previous question.

THE WITNESS: My answer is 50 percent and it is based on, I believe, it has been in the newspapers and every place else.

MR. LINSEY: Q. When did you first learn that this figure of 50 percent bench mark?

A. I don't recall.

Q. Do you recall who first communicated this 50 percent bench mark to you?

A. No, it might have been in the newspaper.

Q. But that is an accurate—you know, you can't believe everything you read in the newspaper, Mr. Korth, we can believe that this particular item that we read in the newspaper, can we not?

A. I think so.

Q. Well if you think so, I am convinced. Having the word of the vice chairman. Mr. Korth, was this bench mark figure ever discussed at a meeting of the Board of Directors of Transamerica Airlines, Inc.?

A. Probably, but only in a general way.

Q. Do you recall who would have initiated discussion on that subject, would that have been Mr. Howard in his role as the informal lead man, if you will, regarding [60] labor relations on Transamerica Airlines?

A. I don't recall.

Q. Was there any discussion as to why it was necessary to establish a figure of a 50 percent bench mark as opposed to other bench marks of say 40 percent, 20 percent, 30 percent, was there any discussion as to how the figure 50 percent was arrived at?

A. No, not to my knowledge.

Q. Have you had any discussion with any company personnel outside of meetings of the Board of Directors to learn of how the figure of 50 percent was arrived at?

A. No, I have not.

Q. Has Transamerica Airlines, Inc. proposed wage reductions for any management personnel?

A. No, currently, no.

Q. Has Transamerica Airlines, Inc. proposed any wage or benefit reductions for any of its officers, executives or directors?

A. Currently, no.

Q. Other than cockpit personnel, than for a cockpit personnel, has Transamerica Airlines, Inc. proposed any wage reductions for personnel of the company at all?

A. As of now, no.

Q. You qualify your answers with the words "as of now." Are you aware of any present intention or plans of [61] Transamerica Airlines, Inc. to reduce the wages

of any personnel, any of its personnel, other than cockpit personnel?

MR. KASPERS: I instruct the witness not to answer that question.

MR. LINSEY: Okay, again, we obviously take issue with that, ask the reporter to mark this and other similar points in the deposition and we will address that with the Magistrate and, obviously, hold the deposition open for a ruling and pursue the answers of that clearly discoverable material.

MR. KASPERS: For the record, we are not agreeing to hold any deposition open.

MR. LINSEY: I think you have made your position clear.

Q. Mr. Korth at any time during meetings of the Board of Directors of Transamerica Airlines, Inc. has there been discussion of a possible strike by the Airline Pilots Association in the course of these negotiations on a collective bargaining agreement?

A. Yes.

Q. When was the first time that the subject of a strike of the airline pilots was addressed at a Board of Directors meeting?

A. I don't recall.

[62] Q. Do you recall by whom it was addressed?

A. No, I do not.

Q. Would that have been Mr. Howard?

A. Would have been, I don't know exactly who might have brought the subject up.

Q. Would this have come up in the calendar year 1983 or 1984?

A. I don't recall, but being in this kind of business, obviously, it comes up in meetings of various kinds.

Q. Placing a time when it was first addressed at the meeting of the Board of Directors of Transamerica Airlines, Inc., would you say it came up at least by early 1984?

A. I don't recall.

Q. Your last meeting of the Board of Directors of Transamerica Airlines, Inc. was in March of 1985, was that right?

A. Yes.

Q. Was the subject of a strike by the airline pilots discussed at that meeting?

A. I wasn't at that meeting. I missed that meeting.

Q. But you were at the meeting which occurred before then, the meeting which occurred in or about January [63] of 1985, were you not?

A. I believe so.

Q. In the Board of Directors meeting of the Transamerica Airlines, Inc. in January of 1985, was there a discussion of a strike by the Airline Pilots Association?

A. I don't recall.

Q. Do you recall if it was at least prior to the meeting in January of 1985 that there was a reference to a possible strike by the Airline Pilots Association?

MR. KASPERS: Object to the form.

THE WITNESS: Yes.

MR. LINSEY: Q. So it was at least back into calendar year 1984 that the subject was addressed at meetings of the Board of Directors of Transamerica Airlines, Inc.; is that correct?

A. I don't recall. The reason I answered that is that we are in various meetings of various subjects, varying times, whether these things came up with the Board of Directors or one of these other meetings, I don't recall.

Q. Have you had meetings in which you participated to discuss collective bargaining with ALPA other than at the Board of Directors meetings?

A. No.

Q. So normally there is no normal meeting which occurs in which you participate at which there is a session [64] concerning collective bargaining between ALPA and the company; is that right?

A. That's right.

Q. Do you recall at approximately how many meetings the subject of a possible strike by the Airlines Pilots Association against the company came up?

A. No, I do not.

Q. Would it be more than three?

A. I just don't recall.

Q. Was there any discussion during any of the references of a possible strike by the Airline Pilots Association against the company, contingency plans of the company, should a strike actually ensue?

A. In a general way, yes.

Q. What was said about the company's plans should a strike ensue?

A. Very little other than the contingency plan was being looked at, put together.

Q. Who was responsible for putting together the contingency plan?

A. I don't know for sure but normally would come back to Mr. Howard's jurisdiction.

Q. Were there plans to operate during a strike by the pilots should that ensue?

A. Only a general discussion of that was had, and [65] the answer to it is yes.

Q. Was there any discussion of how the company would operate should a strike actually ensue?

A. No.

Q. Was there any discussion concerning the obtaining of strike replacements, of replacements for striking pilots, should a strike actually ensue?

A. No.

* * *

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 85 2803 SW

AIRLINE PILOTS ASSOCIATION,
Plaintiff,

vs.

TRANSAMERICA AIRLINES, INC.,
Defendant.

DEPOSITION OF ERNEST EASTMAN

May 8, 1985

* * *

[16] Q. Did you participate in drafting the company's opener, Section 6 opener, to ALPA for a new collective bargaining agreement?

A. Yes, I did.

Q. When did you begin working on such an opener?

A. Actually sat down and began to draft the opener, I would say, roughly in January of '84.

Q. Did you have any meetings with other personnel, officers or directors of Transamerica Airlines, Inc. concerning this opener?

A. Yes.

Q. When was the first such meeting?

A. I think it was approximately that same time.

Q. January of 1984; is that right?

A. I believe so.

[17] Q. Was there any goal that was established and communicated to you that the company sought to achieve in these negotiations?

A. In terms of what?

Q. Say, let's start with money, was there any, I assume the company sought economic concessions from ALPA; is that correct?

A. In the opener, yes we did.

Q. Was there a percentage for reduction of pilot pay which was formulated by you and other personnel of Transamerica Airlines?

MR. KASPERS: Are you talking about in the opener?

MR. LINSEY: That's right.

THE WITNESS: We didn't begin with a percentage, we began with the observation that we had to bring our wages in line with the people we were competing against.

MR. LINSEY: Q. By "wages," you meant wages of cockpit personnel; is that right?

A. We are talking about the cockpit opener, aren't we?

Q. Yes.

A. Then yes, I do mean that.

Q. Who participated in this discussion?

[18] A. Captain Neff, myself, Mr. Berghel, I believe.

Q. At that time was there mentioned a figure of 50 percent or 60 percent reduction in pilot wages?

A. I don't recall. My recollection is not us talking to each other that we had to reduce them 50 percent. My recollection is our conversations were we have to get them down into this range. That was pretty much established by the surveys we had done of the competition.

Q. When did you do the surveys of the competition?

A. Captain Neff performed that function.

Q. When did he perform that function?

A. I assume that it was shortly before we began working on our opener.

Q. So this would have been late 1983; is that correct?

A. Late '83 and '84 as I recall, yes.

Q. Did he produce a written report?

A. I believe he did.

Q. Was that report distributed and presented at a meeting in which you participated?

A. I don't believe so. I don't think that's how I came to have a copy of the report. I believe it was routed to me.

Q. Do you recall from whom you received that report?

[19] A. Captain Neff, if my recollection serves.

Q. Have you at any time heard the bench mark figure of 50 to 60 percent reduction in pilot wages?

A. Of course.

Q. When was the first time that you heard that figure?

A. I can't tell you exactly but, you know, as we looked at the figures we were working with, it is not difficult to look and say "Gee whiz, this comes out to be about a 50 or 60 percent reduction." I believe that is how it came about. As I say, I don't think anyone came up and told me that there will be a 50 percent reduction, that is not the way it occurred in my recollection.

Q. Was this adopted as a goal of the company in collective bargaining with the pilots?

A. Not to my knowledge, no.

Q. So it would be incorrect to say that 50 to 60 percent reduction of pilot costs was a bench mark that the company had established for these collective bargaining negotiations?

A. Yes.

Q. Was there any discussion as to the method the company would use to achieve a reduction of 50 to 60 percent of a reduction of pilot wages?

A. Collective bargaining was the only method we [20] had ever considered.

Q. Did you discuss the possibility of a strike resulting from these negotiations?

A. Yes.

Q. When do you first recall discussing the possibility of a strike?

A. I think probably at the time we began working on the Section 6 opener or during that period of time.

That's a common approach that we take on every Section 6 opener, what might the result of this be?

Q. How many Section 6 openers have you assisted in preparing here at Transamerica Airlines?

A. Just this pilot opener, the opener for the flight engineers, the opener for the flight attendants, we have three unions.

Q. When did you assist in preparing the flight engineers opener?

A. Shortly after the pilots' opener was prepared.

Q. So that would have been in the spring of 1984?

A. That's right.

Q. The flight attendants' opener you participated in drafting shortly after your arrival here?

A. No, that's not correct. I joined the negotiating team during the negotiations. When I arrived that opener had been served. I am currently preparing a [21] Section 6 opener to serve upon the flight attendants.

Q. Okay, another opener?

A. Right.

Q. With whom did you have discussions concerning the possibility of a pilot strike in January of 1984?

A. I don't remember specifically, it could only have been two or three people. It could only have been Captain Neff, Mr. Berghel or my supervisor, Mr. Riley.

Q. Did the company make a decision to produce an operating plan to provide for the contingency of a pilot strike?

A. Yes.

Q. When did work on such a plan begin?

A. I have been working on that document off and on for the last, I would say, this is June, I would say close to a year.

Q. That would be since June 1984; is that right?

A. That's very rough, yeah. I probably was working on it before then, I mean it is a document that you take out and polish up and revise periodically. It is not something created in whole cloth every time.

Q. Approximately how many pages is that document?

A. Roughly 150, I would say. I could be off by 50 pages.

Q. During the course of collective bargaining [22] negotiations with the pilots, did the company begin to execute any elements of that strike plan?

A. No.

Q. Is one of the elements of that strike plan the hiring or obtaining by contract or other means replacement pilots to replace striking ALPA pilots?

A. No.

Q. Is one of the elements of that plan the continuation of flight operations during the course of the strike?

A. Yes.

Q. By what means would this occur?

MR. KASPERS: I'd instruct him not to answer that question.

MR. LINSEY: On what basis?

MR. KASPERS: It is confidential, and inappropriate and unrelated to this lawsuit.

MR. LINSEY: I think that it is.

MR. KASPERS: I don't think it would be appropriate to delve into contingency arrangements under the guise of this lawsuit.

MR. LINSEY: That is what this lawsuit is all about.

MR. KASPERS: Well, if you intend to get that information, you are going to have to do it from—I have [23] instructed the witness not to answer.

MR. LINSEY: We would ask that the court reporter to mark this location in the record and reserve our right to proceed for an Order to Compel.

Q. What are the other elements of the strike plan that you have prepared?

A. I am not sure that I can categorize them or name them all. Security is one that comes to my mind, continuing operations I guess we have already touched on. I don't know how—to have a section on decision making regarding what flights should be operated and in what order.

Q. Would you describe the process for me of how the company decided what it wanted to achieve in these negotiations for a new agreement with ALPA?

A. I am not sure I understand your question.

Q. Did you receive any instructions from the company's Board of Directors or the company's Executive Board or Executive Committee concerning goals in these collective bargaining negotiations?

A. From the Board of Directors, no. I don't know what you mean by "Executive Committee."

Q. Does Transamerica Airlines, Inc., have an Executive Committee or an Executive Board?

A. Maybe they do. I don't know what you mean by that.

[24] Q. Have you ever heard the term?

A. Executive Committee? No, I never have.

Q. How about Executive Board?

A. I never have.

Q. That would be a Board or committee of, say, four personnel including Howard Korth, H. K. Howard and two other individuals?

A. If there is such a committee, I don't know it by that name.

Q. Did you receive any guidelines concerning these collective bargaining negotiations from any other group of executives, officers or directors, of Transamerica Airlines, Inc.?

A. From a group of people, no.

Q. You would just receive word from individuals; is that right?

A. That's correct.

Q. Did you receive any guidelines or instructions from H. K. Howard concerning these negotiations?

A. No, I did not.

Q. From whom did you receive any guidelines?

A. The input to me was through, primarily, people within the operations department and they would come to me over the course of the term of the previous contract, memo, "Ernie, we need to think about changing this in the [25] contract, whatever it is, next time around, it is giving us a problem."

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 85 2803 SW

AIRLINE PILOTS ASSOCIATION,
Plaintiff,

vs.

TRANSAMERICA AIRLINES, INC.,
Defendants.

DEPOSITION OF HANK BATHEY

May 9, 1985

* * *

[42] * * * around, we were thinking of leasing in additional equipment to fly passengers.

Q. Mr. Bathey, have you heard that it is a goal of management in these contract negotiations to achieve a 50 or 60 percent cost reduction in terms of wage reductions and work rule concessions by the Airline Pilots Association?

A. I have heard it from the pilots.

Q. Have you heard it from any management official that that is a goal to be achieved in these contract negotiations?

A. No not those numbers.

Q. What type of numbers have you heard from management personnel?

A. I have not heard a number exactly put out as an overall goal.

Q. Have you heard any numbers or any percentages?

A. I have read them in the opener.

Q. Other than what you have read in the opener, have you heard of any numbers or percentages?

A. Not specifically, no, I mean from a company officials. I have heard them from pilots but not from company officials.

Q. Mr. Bathey, have you participated in any plans, should there be a strike, any plans or contingency, should their be a strike by the Airline Pilots Association in the [43] course of these collective bargaining negotiations?

A. Negative.

Q. Has the company made any plans to hire any replacement pilots should there be a strike?

A. Not that I am aware of.

Q. Mr. Bathey, do you serve on the management negotiating committee for the new agreement with ALPA?

A. No.

Q. Have you ever participated in any meetings of the negotiating committee for the new collective bargaining agreement with ALPA?

A. Only prior to submission of the opener.

* * *